Exhibit 6

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

IN RE:	§	
	§	**CASE NO. 11-13463-DWH**
MARITIME COMMUNICATIONS/ LAND MOBILE, LLC,	§	**CHAPTER 11**
Debtor.	§	

SKYTEL'S OBJECTION TO CONFIRMATION OF THE DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION

COME NOW Warren Havens, Skybridge Spectrum Foundation, Verde Systems LLC, Environmental LLC, Intelligent Transportation & Monitoring LLC, and Telesaurus Holdings GB LLC (collectively, "SkyTel"),[1] and file this *Objection* (the "Objection") to the *First Amended Plan of Reorganization* (the "Plan," Dkt. #669) filed by Maritime Communications/Land Mobile, LLC (the "Debtor").[2] In support of its Objection, SkyTel states as follows:

BACKGROUND AND INTRODUCTION

On August 1, 2011 (the "Petition Date"), the Debtor commenced the above-captioned bankruptcy case (the "Bankruptcy Case") by filing a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Code"). No trustee or examiner has been appointed, and the Debtor is operating its businesses and managing its property as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

[1] The SkyTel entities listed here are separate legal entities, all managed by Warren Havens, and for the purposes of this bankruptcy and in related proceedings before the Federal Communications Commission, pursue certain common interests.

[2] The Debtor also filed a *Third Amended Disclosure Statement* (the "Disclosure Statement," Dkt. #668) in support of the Plan. The proposal of Choctaw and the entities/people related thereto (sometimes referred to collectively herein as "Choctaw") (the proposal is referred to as the "Choctaw Proposal"), and the proposal of Council Tree Investors ("CTI") (referred to as the "CTI Proposal"), are both attached to the Disclosure Statement as exhibits.

SkyTel is a creditor and party-in-interest herein.[3] SkyTel generally demands that the Debtor affirmatively establish each element required for confirmation under, *inter alia*, 11 U.S.C. § 1129(a) and (b). Further, without assuming the burden of proof or burden of persuasion with respect to the specific objections set forth below, SkyTel objects to confirmation of the Plan as permitted by 11 U.S.C. § 1128, on the following grounds, among possible others:

- The Plan Should Not be Confirmed Because it Includes Impermissible Releases of Third Parties.
- The Plan Should Not be Confirmed to the Extent it Impermissibly Fails to Preserve SkyTel's Claims in and in Connection with the Licenses in both the FCC Proceedings and New Jersey Litigation.
- The Plan Should Not be Confirmed Because it Improperly Purports to Discharge the Debtor Under § 1141(d)(3)
- The Plan Should Not be Confirmed Because it is Not Feasible.
- The Plan Should Not be Confirmed Because it Has Not Been Proposed in Good Faith.
- The Plan Should Not be Confirmed to the Extent it Purports to Disallow SkyTel's Potential Treble Damages Award in the New Jersey Litigation
- The Plan Should Not be Confirmed Because it Fails to Include a Liquidation Analysis and Does Not Meet the Best Interests of Creditors Test
- The Plan Should Not be Confirmed Because the Debtor Has Not Complied with the Provisions of Code as Required by § 1129(a)(2).
- The Plan Should Not be Confirmed Because its Proposed Treatment of Certain Executory Contracts and Unexpired Leases is Impermissble under § 1129(a)(1).
- The Plan Should Not be Confirmed Because it Does Not Meet the Requirements for Cramdown Under § 1129(b).
- Alternatively, in the Event the Plan is Confirmed (Which it Should Not be), SkyTel Requests that the Confirmation Order Contain Language Consistent with the Court's Prior Orders.

[3] *See e.g.* Claim No. 69; 11 U.S.C. § 1109; Dkt. #685.

RESERVATION OF RIGHTS

SkyTel reserves the right to assert supplemental or additional objections, along with additional grounds in support of its objections, at or before the confirmation hearing.

CONFIRMATION STANDARDS

To confirm a proposed, consensual Chapter 11 plan of reorganization, the proponent bears the burden of establishing by a preponderance of the evidence the plan's compliance with each element of 11 U.S.C. § 1129(a), including § 1129(a)(1) which requires plans to comply with all "applicable provisions" of the Code.[4] The Code imposes an independent duty on the court to determine whether a plan satisfies each element of § 1129(a), regardless of the absence of valid objections to confirmation.[5]

To confirm a proposed, nonconsensual plan, the proponent bears the burden of establishing by a preponderance of the evidence the plan's compliance with each element of § 1129(a) except one -- i.e., that all classes consent or are unimpaired[6] -- plus compliance with the additional "cramdown" requirements of § 1129(b). Those additional requirements, which the proponent must establish by clear and convincing evidence[7], are that the plan does not unfairly discriminate against impaired non-consenting classes and that treatment of such impaired non-consenting classes is fair and equitable.[8]

[4] 11 U.S.C. § 1129(a); *In re Gulfstar Indus., Inc.*, 236 B.R. 75, 77 (M.D. Fla. 1999); *Beal Bank, S.S.B. v. Waters Edge L.P.*, 248 B.R. 668, 690 (D. Mass. 2000); *In re Locke Mill Partners*, 178 B.R. 697, 700 (Bankr. M.D.N.C. 1995).
[5] *In re Bolton*, 188 B.R. 913, 915 (Bankr. D. Vt. 1995); *In re Shadow Bay Apartments, Ltd*., 157 B.R. 363, 365 (Bankr. S.D. Ohio 1993).
[6] 11 U.S.C. § 1129(a)(8); *Locke Mill Partners*, 178 B.R. 697.
[7] *In re Agawam Creative Mktg. Assoc. Inc.*, 63 B.R. 612, 619 (Bankr. D. Mass. 1986).
[8] 11 U.S.C. § 1129(b).

OBJECTION

I. The Plan Should Not be Confirmed Because it Includes Impermissible Releases of Third Parties in Violation of § 524(e) (And, Therefore, § 1129(a)(1)) of the Code.

The Plan contains third-party releases, an exculpation clause, and other clauses that purport to release, exculpate, and/or discharge various non-Debtor parties, and/or to enjoin third-parties from bringing claims against those non-Debtor parties.[9] The clauses at issue violate § 524(e) of the Code and the Fifth Circuit's[10] prohibition against such nonconsensual third-party discharges (with some very limited exceptions discussed below). Because § 1129(a)(1) requires that a plan comply with all applicable provisions of the Code, and because the Plan before the Court violates § 524(e), the Debtor's proposed Plan should not be confirmed.[11]

A. Third-Party Releases in the Fifth Circuit Court of Appeals

Section 524(e) of the Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[12]

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[9] *See e.g.* Plan, Dkt. #669, at pp. 26, 31-32; Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D), p.3.

[10] *Bank of New York Trust Co., NA v. Official Unsecured Creditor's Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009); *see also In re Bigler LP*, 442 B.R. 537 (Bankr. S.D. Tex. 2010) (Applying *In re Pac. Lumber Co*, and holding that "[t]he Fifth Circuit's language restricting non-debtor releases [in *Pacific Lumber*] is strong, and, with the exception of a provision for limited releases for committees, does not hedge on its limitation of non-debtor releases."); *In re Pilgrim's Pride Corp.*, 2010 Bankr. LEXIS 72 (Bankr. N.D. Tex. January 14, 2010) (Holding that "[b]ecause *Pacific Lumber* is binding precedent, the court may not, over objection, approve through confirmation of the Plan third-party protections, other than those provided to the Committees, members of the Committees, and the Committees' Professionals," which is separately allowed under § 1103.").

[11] *In re Robert's Plumbing & Heating, LLC*, 2011 Bankr. LEXIS 2879, *8-12 (Bankr. D.M. 2011) ("Pursuant to Section 1129(a)(1), a plan must comply with the applicable provisions of the Code. Section 524(e) provides, [that the] discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any entity for, such debt' . . . . [Because] the plan provisions that bar the collection of debt from non-debtor third-parties violate Sections 524(e) and 1129(a)(1) and (3) of the Code . . . . the plan is unconfirmable . . . ."); *In re Keller*, 157 B.R. 680, 686 (Bankr. E.D. Wa. 1993) ("Under § 1129(a), a bankruptcy court must make an independent determination that a plan complies with the provisions of Title 11 . . . . Here, since the Plan proposes to release the non-debtor Deedholder's properties from obligations to Creditor, the Plan still violates § 524(e) and cannot be confirmed. 'The clear weight of authority supports the proposition that Chapter Eleven plans which call for the release of non-parties (such as guarantors) from liability upon obligations of the debtor are violative of § 524(e).").

[12] 11 U.S.C. § 524(e).

Some circuit courts have held that § 524(e) does not specifically prohibit third-party releases[13] and allow such releases if unusual circumstances are present.[14] Significantly, however, the Fifth Circuit has unequivocally held that, absent consent (and SkyTel does *not* consent), and with some very limited exceptions discussed below, § 524(e) prohibits such releases.[15]

In *In re Pacific Lumber*, the Fifth Circuit addressed, among other things, whether a Chapter 11 plan may nonconsensually release, discharge, and/or exculpate third-party non-debtors.[16] In that case, the period of exclusivity expired, and Marathon Structured Finance, a secured creditor, and Mendocino Redwood Company, a competitor of the debtors, filed their own plan, which the bankruptcy court confirmed.[17] That plan proposed to dissolve the debtor-entities and transfer substantially all of the debtor's assets to two new entities -- Townco and Newco.[18] The plan also converted Marathon's secured claim into equity in Townco and Newco, giving Marathon full ownership of Townco and a 15% ownership interest in Newco.[19] Both Marathon and Mendocino would contribute $580 million towards paying off claims of both debtors, and Mendocino would manage Newco.[20] Further, the plan contained a third-party release clause that purported to "release Marathon, Mendocino, Newco, Townco, and the Unsecured Creditor's Committee from liability -- other than for willfulness and gross negligence -- related to proposing, implementing, and administering the plan."[21] After the bankruptcy court

[13]*See e.g. In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002).
[14]*In re SL Liquidating, Inc.*, 428 B.R. 799, 801 (Bankr. S.D. Ohio 2010) ("The Sixth Circuit allows non-consensual third party releases, but characterizes such an injunction as a 'dramatic measure to be used cautiously' and as 'only appropriate in 'unusual circumstances.'") (citing *In re Dow Corning Corp.*, 280 F.3d at 658).
[15]*In re Pac. Lumber*, 584 F.3d 229. The Ninth and Tenth Circuits hold the same. *See In re Lowenshuss*, 67 F.3d 1394, 1401 (9th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990).
[16] *In re Pac. Lumber*, 584 F.3d at 236.
[17]*Id*. at 237.
[18]*Id*.
[19]*Id*.
[20]*Id*.
[21]*Id*. at 251.

confirmed the plan, the indentured trustee and other parties to the Chapter 11 case appealed, arguing, among other things, that the plan "include[d] unauthorized third-party releases and exculpation provisions."[22]

On appeal, Marathon and Mendocino responded that "without the clause neither company would have been willing to provide the plan's financing,"[23] and that the court should adopt the "lenient approach to non-debtor releases taken by other courts."[24] Writing for the Court, Chief Judge Jones rejected both arguments. First, the Court held that there is "little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization." Second, Fifth Circuit precedent held "that Section 524(e) only releases the debtor, not co-liable third parties [and] [t]hese cases *seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions*."[25] Chief Judge Jones addressed the "lenient" standard applied in other jurisdictions and noted that those "cases all concerned global settlements of mass claims against the debtors and co-liable parties."[26] Further, the Court noted that § 524(g) of the Code specifically permits bankruptcy courts "to enjoin third-party asbestos claims under certain circumstances, which suggests non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets."[27] *Pacific Lumber*, however, did not involve mass tort claims. "Instead, the essential function of the exculpation clause proposed [was] to absolve the related parties from any negligent conduct that occurred during the course of the

[22] *Id*. at 239.
[23] *Id*. at 252.
[24] *Id.* (citing *SEC v. Drexel Burnham Lambert Group*, 960 F.2d 285, 293 (2d Cir. 1992); *In re A.H. Robins*, 880 F.2d 694, 701 (4th Cir. 1991)).
[25] *Id*. (citing *In re Coho Res, Inc.*, 345 F.3d 338, 342 (5th Cir. 2003); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997); *Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53-54 (5th Cir. 1993); (*Zale Corp. v. Feld (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995)) (emphasis added).
[26] *Id*. at 252.
[27] *Id*.

bankruptcy."[28] Chief Judge Jones concluded that "[t]he fresh start § 524(e) provides to debtors is not intended to serve this purpose."[29]

In the opinion, the Court also noted that just as § 524(g) specifically allows a bankruptcy court to enjoin third-party asbestos claims, § 1103(c) specifically allows third-party releases for a creditors' committee and its members.[30] Under this reasoning, it appears clear that the Fifth Circuit will make exceptions to the otherwise "categorical prohibition against non-debtor releases"[31] only where the Code *specifically* allows it. Otherwise, releases are prohibited. In that regard, it should be noted that § 105(a) "is an omnibus provision phrased in such *general* terms as to be the basis for a *broad* exercise of power"[32] by the bankruptcy court. Accordingly, the Fifth Circuit has held that it must overturn an injunction granted under § 105's broad power that "effectively discharges a non-debtor."[33]

Finally, Chief Judge Jones distinguished two prior Fifth Circuit cases that, before *Pacific Lumber*, appeared to cast doubt on the general prohibition against non-debtor releases.[34] Both *Republic Supply Co. v. Shoaf*[35] and *Apple Chair Co. v. Three Rivers Planning & Dev. Dist.*[36] "concern[ed] the *res judicata* effect of non-debtor clauses, *not their legality*."[37] In these cases, *res judicata* barred parties from bringing claims against non-debtors where a third-party release

[28] *Id*.
[29] *Id*. at 252-53.
[30] *Id*. at 253 ("We agree, however, with courts that have held that 11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties . . . . Consequently, the non-debtor releases must be struck except with respect to the Creditors Committee and its members.").
[31] *Id*. at 252 n. 27.
[32] Collier on Bankruptcy ¶ [105.01] (16th ed.) (emphasis added).
[33] *In re Zale Corp.*, 62 F.3d at 760.
[34] *Id*. at 252, n. 27.
[35] *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).
[36] *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist.*, 203 F.3d 914 (5th Cir. 2000).
[37] *In re Pac. Lumber*, 584 F.3d at 252 n. 27.

prohibited the claim.[38] This was so because the parties bringing the claims "failed to object to the release at confirmation."[39]

After *Pacific Lumber*, bankruptcy courts within the Fifth Circuit have held that there is a categorical prohibition against non-consensual third-party releases in this circuit (with the very limited exceptions discussed above) and that "the ruling in *Pacific Lumber* is not limited to its facts. Indeed, there is nothing in the *Pacific Lumber* opinion which . . . can reasonably be read to limit its ruling . . . ."[40] As noted by the Bankruptcy Court for the Northern District of Texas, *Pacific Lumber* "is binding precedent, [that] the court may not, over objection, approve through confirmation of the Plan third-party protections . . . ."[41] The Southern District and Western District of Texas have held the same: "[t]he Fifth Circuit has recently issued an opinion interpreting § 524 of the Code [in a manner that] substantially restricts the incorporation of releases in Chapter 11 plans."[42] Post-*Pacific Lumber*, third-party releases are prohibited absent consent or a specific code provision *specifically* allowing release, discharge, or injunction -- neither of which are present here.

B. Third-Party Releases in the Debtor's Plan

Like in *Pacific Lumber*, the Plan here contains third-party releases, an exculpation clause, and other clauses that violate § 524(e); therefore, the Plan cannot be confirmed. Also like in *Pacific Lumber*, the Plan here provides -- under both the Choctaw and CTI Proposals -- that the Debtor will transfer (or at least will attempt to transfer) substantially all of its assets to a newly

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[38] *Id*.
[39] *Id*.
[40] *In re Pilgrim's Pride Corp.*, 2010 Bankr. LEXIS 72, at *16 (Bankr. N.D. Tex. January 14, 2010).
[41] *Id.* at *16.
[42] *In re Bigler LP*, 442 B.R. 537, 539-40 (Bankr. W.D. Tex. 2011) (citing *In re Pac. Lumber*, 584 F.3d at 253); *See also In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701-02 (Bankr. W.D. Tex. 2011) (Holding that the Fifth Circuit only allows releases "so long as there is consent.").

formed entity, subject to FCC approval in this case.[43] And just as the plan proponents in *Pacific Lumber* proposed to own and manage the new entities at issue there in exchange for a release of liability, Choctaw and CTI propose to operate the new entities at issue in the Plan in exchange for, among other things, the subject releases.[44]

Under the Plan, certain of the Debtor's identified secured creditors (namely, those identified as the holders of class 1, 2, and 3 claims) have, along with Patrick Trammell (the President of the Debtors' DIP Lender) ("Trammell") formed a new, separate entity named Choctaw Telecommunications, LLC ("Choctaw"), to which these secured creditors and Trammell have assigned their claims.[45] Choctaw, in turn, is the sole member and owner of "Choctaw Holding, LLC ("Holding").[46] In satisfaction of Choctaw's claims against the Debtor, Choctaw proposes that the Debtor "will transfer, assign, and sell to Holding, all of the Debtor's right, title, and interest in [its] FCC Spectrum Licenses," subject to FCC approval.[47] After FCC approval, Choctaw next proposes that Holding will market and sell the subject Licenses "in its sole and absolute discretion."[48] Similarly, CTI plans to form a new, separate entity, known as CTI Maritime Holdings, LLC ("Maritime Holding"). Under CTI's Proposal, and subject to FCC approval, the Debtor will transfer (or at least will attempt to transfer) all of its FCC Spectrum Licenses to Maritime Holding, through which CTI proposes to market and sell the Licenses.[49]

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[43] *See e.g.* Plan, Dkt. #669, at p. 10 ("The Secured Creditors and Trammell have formed a separate entity known as "Choctaw" . . . and have each assigned their respective Claims to Choctaw. Choctaw is the sole member of, and owns all equity in, Holding. In exchange for, and in consideration and full satisfaction of Choctaw's Claims against the Debtor and Choctaw's release of the Debtor from all liability to Choctaw on account of the Claims, the Debtor will transfer, assign, and sell to Holding all of the Debtor's right, title, and interest in the FCC Spectrum Licenses."); *see also* Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D).

[44] *See e.g.* Plan, Dkt. #669, at p. 10

[45] *See e.g.* Plan, Dkt. #669, at p. 10.

[46] *See e.g.* Plan, Dkt. #669, at p. 10.

[47] *See e.g.* Plan, Dkt. #669, at p. 10.

[48] *See e.g.* Plan, Dkt. #669, at p. 10.

[49] *See e.g.* Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D), pp. 8-14.

Both the Choctaw and CTI Proposals provide for paying the remaining allowed claims against the Debtor through, essentially, certain "waterfall" payments described in the Plan and/or the Proposals.[50]

Regarding Choctaw's and CTI's duties to market and sell the subject Licenses under their respective proposals, and the issue of obtaining the required FCC approvals, the Plan (and the Choctaw Proposal[51]) contain a No Liability Clause (the "No Liability Clause") purporting to release and discharge Choctaw/CTI from any liability in connection with those duties:

> 4. No Liability for Failure to Obtain FCC Approval
>
> The party that prevails under the Plan, whether [CTI] or Choctaw, shall not have any liability to the Liquidating Agent, any Creditor, or any other party for the failure of the FCC to approve the transfer of any FCC Spectrum License for any reason, including but not limited to the prevailing party's failure or refusal to request such approval in its sole and absolute discretion.[52]

The Plan (and the Choctaw Proposal) also contain a more general Exculpatory Clause (the "Exculpatory Clause"), which provides in pertinent part as follows:

> 9. Exculpation
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> From and after the effective date . . . (b) all current officers and directors, and all other agents, employees, professionals and representatives of the debtor; (c) the liquidating agent; (d) all agents, employees, professionals and representatives of the liquidating agent; (e) the Committee, its members and its professionals (collectively, with each of their predecessors and successors in interest and their respective general and limited partners, officers, directors, employees, agents, professionals and other representatives, the "Exculpated Parties") shall neither have nor incur any liability to any person or entity for any act taken or omitted to be taken from and after the petition date in connection with or related to the formulation, preparation, dissemination, implementation, administration, confirmation or consummation of the Plan, any sales of any assets, the disclosure statement or any contract, instrument, release or other agreement or document created or entered into post petition in connection with the Plan. . . . From and

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[50] *See e.g.* Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), pp. 3-7; Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D), pp. 8-14.

[51] To the extent of any overlap between the explicit terms of the Plan and the terms set forth in the Choctaw Proposal or CTI Proposal, SkyTel's references and objections to the explicit terms of the Plan shall constitute references and objections to the overlapping terms in the Proposals (and vice versa).

[52] *See* Plan, Dkt. #669, at p. 26; Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), p. 16.

> after the confirmation date, all persons are permanently enjoined from commencing or continuing in any manner, any suit, action or other proceeding, on account of or respecting any claim, obligation, debt, right, cause of action, remedy or liability released or to be released against any exculpated party pursuant to the Plan.[53]

The Plan also incorporates by reference various releases contained in the Choctaw and/or CTI Proposals.[54] One such release contained in the Choctaw Proposal (the "Choctaw Proposal Release") provides in pertinent part as follows:

> Holding and Choctaw and their respective parents, subsidiaries, affiliates, shareholders, members, partners, managers, directors, officers, employees, agents and Professional Persons (collectively, the "Released Parties") are released and discharged from any and all claims, lawsuits or demands that have been, could have been, or which may in the future be asserted by the Debtor or by any third party for any act or omission in connection with or arising out of the transactions, relationships, or dealings relating to the negotiation or implementation of the Choctaw Proposal, the settlement of Claims and releases incorporated in the Choctaw Proposal, the solicitation of votes for or confirmation of the Plan, any pre-Petition Date or post-Petition Date Claim of any kind, and any other matter pertaining to the Debtor or this Chapter 11 Case . . . and the Released Parties shall have no liability to each other or any holder of any Claim for any act or omission in connection with or arising out of, transactions, relationships or dealings relating to the negotiation or implementation of the Choctaw Proposal, the settlement of Claims and releases incorporated into the Choctaw Proposal, the solicitation of votes for or confirmation of the Plan, and Pre-Petition or Post-Petition Claim of any kind, and any other matter pertaining to the Debtor or this Chapter 11 case . . . .[55]

The Plan, and the Choctaw Proposal, contain other provisions which can be read to attempt to effectuate third-party releases. For example, the Plan (and the Choctaw Proposal) provide as follows:

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[53] Plan, Dkt. #669 at pp. 31-32; Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), pp. 21-22. There is a limited exception for liability resulting from acts or omissions determined to have constituted gross negligence or willful misconduct.

[54] *See* Plan, Dkt. #669, at p. 31 ("Various releases are called for within the Choctaw [Proposal] (Exhibit "C" to the Disclosure Statement, which is incorporated herein by reference) and the [CTI] [Proposal] (Exhibit "D" to the Disclosure Statement, which is incorporated herein by reference). Those releases are incorporated by reference in this section of the Plan.").

[55] *See* Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), p. 21. There is a limited exception for willful misconduct or violation of federal securities laws.

> [T]he Confirmation Order shall provide . . . that all Creditors and persons who . . . may hold Claims or Interests that existed prior to the Effective Date, are permanently enjoined on and after the Effective Date against the: (i) commencement or continuation of any . . . action or proceeding . . . on account of claims released pursuant to the Plan.[56]

C. SkyTel's Objections[57]

SkyTel objects to *each and every* Plan provision that purports to release, exculpate, and/or discharge various non-Debtor parties, and/or to enjoin third-parties (such as SkyTel) from bringing claims against those non-Debtor parties, in violation of § 524(e) of the Code and binding Fifth Circuit precedent. SkyTel objects to any Plan provision that purports to operate to, or to have the effect of, impairing the legal or equitable rights of SkyTel, if any, with respect to claims against non-Debtor parties.

For example, in the Exculpatory Clause, the Plan impermissibly provides for the release of (1) the Debtor's "current officers and directors, and all other agents, employees, professionals and representatives of the debtor"; (2) "the liquidating agent"; and (3) "all agents, employees, professionals and representatives of the liquidating agent," and includes within the definition of those released "each of their predecessors and successors in interest."[58] As noted by the Bankruptcy Court for the Western District of Texas in *In re Bigler LP*, releases to "third-parties, such as a debtor's directors and officers, [are] prohibited" under *Pacific Lumber*.[59] Indeed, in *Pacific Lumber*, the Fifth Circuit held that:

> There are no allegations in this record that either MRC/Marathon or their or the Debtors' officers or directors were jointly liable for any of Palco's or Scopac's pre-petition debt. They are not guarantors or sureties, nor are they insurers. Instead, the

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[56] Plan, Dkt. #669 at pp. 30, 33; Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), p. 20.
[57] In addition to the specific Plan and Proposal provisions discussed herein, Skytel also objects to any and all language which may be contained in the Disclosure Statement, Plan, Choctaw Proposal, and/or CTI Proposal that could be construed as a third-party release, a third-party discharge, or an injunction against Skytel bringing any claim it holds or may later hold against any third-party.
[58] *See* Plan, Dkt. #669, at p. 31.
[59] *In re Bigler LP*, 442 B.R. at 541.

> essential function of the exculpation clause proposed here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy. The fresh start § 524(e) provides to debtors is not intended to serve this purpose.[60]

In *In re Bigler LP*, the Court also held that, while third-party releases of creditor committees *are* acceptable under §§ 524(e) and §1103(c), a "Liquidating Trust is a third-party who is *not* entitled to discharge under the plain language of §524(e) and *Pacific Lumber*."[61] The *Bigler* court struck down an exculpatory clause with language similar to that here:

MCLM's Proposed Plan	*In re Bigler LP*
[The released parties] shall neither have nor incur any liability to any person or entity for any act taken or omitted to be taken from and after the petition date in connection with or related to the formulation, preparation, dissemination, implementation, administration, confirmation or consummation of the plan, any sales of any assets, the disclosure statement or any contract, instrument, release or other agreement or document created or entered into post petition in connection with the plan.[62]	The released parties are hereby released from and shall not have or incur any liability for any act taken or omission made in good faith in connection with or in any way related to (a) negotiating, formulating, implementing, confirming, administering, or consummating the plan, the disclosure statement or any plan document, or other agreement or document created in connection with or related to this plan, the disclosure statement, any plan of reorganization or liquidation or disclosure statement of any of the debtors, or the administration of these chapter 11 cases, or (b) any liability, claim or cause of action, whether known or unknown, asserted or unasserted, belonging to or assertable by the debtors or the estates against the released parties, from the beginning of time until the effective date . . . .[63]

[60] *In re Pac. Lumber*, 584 F.3d at 252-53.
[61] *In re Bigler LP*, 442 B.R. at 546; *See In re Pac. Lumber*, 584 F.3d at 253 ("We agree, however, with courts that have held that 11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties.").
[62] *See* Plan, Dkt. #669, at p. 31.
[63] *In re Bigler LP*, 442 B.R. at 546.

As the *Bilger* court correctly held, the language at issue here "is exactly the sort of release the Fifth Circuit forbade in *Pacific Lumber*: it releases the Released Parties from liability for non-willful misconduct during the pendency of the bankruptcy."[64]

The Plan's No Liability Clause is also an impermissible third-party release under § 524(e).[65] Again, as noted above, a clause that purports to release third-parties from any liability regarding the "administration or consummation" of the plan is invalid.[66] The No Liability Clause at issue here purports to release Choctaw and CTI from any liability regarding their duties to market and sell the Debtor's FCC Spectrum Licenses and/or in connection with obtaining the required FCC approvals.[67] Clearly, the "essential function" of this clause is to impermissibly "release[] parties from any negligent conduct . . . occur[ing] during the course of the bankruptcy."[68] Just as in *Pacific Lumber*, such a clause is inequitable and violates § 524(e).[69]

In addition, the Choctaw Proposal Release, set forth above, is overly broad and "exactly the sort of release the Fifth Circuit forbade in *Pacific Lumber*."[70] This clause purports to release and discharge, among others, Holding and Choctaw from a litany of potential claims, including "*any* and *all* claims, lawsuits or demands that *have been*, *could have been*, or which *may in the future be asserted* by . . . any third party for *any* act or omission in connection with or arising out of the . . . implementation of the Choctaw Proposal . . . [and] *any* pre-Petition Date or post-Petition Date Claim of *any* kind . . ."[71] A similarly broad release was rejected by the court in *In*

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[64] *In re Bigler LP*, 442 B.R. at 546 (citing *In re Pac. Lumber*, 584 F.3d at 252 ("the bargain the proponents claim to have purchased is exculpation from any negligence that occurred during the course of the bankruptcy.")).
[65] *See* Plan, Dkt. #669, at p. 26; Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), p. 16.
[66] *In re Pac. Lumber*, 584 F.3d at 252.
[67] *See* Plan, Dkt. #669 at p. 26; Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), p. 16.
[68] *In re Pac. Lumber*, 584 F.3d at 252.
[69] *Id*.
[70] *In re Bigler LP*, 442 B.R. at 546.
[71] *See* Disclosure Statement, Dkt. #668, at Choctaw Proposal (Exhibit C-1), p. 21

re Bigler LP.[72] In that case, the clause purported to "release[] and discharge[] each released party from *any* and *all* causes of action whatsoever that constitute property of the estates . . . ." The language in both clauses "is overly broad and pushes [the clauses] into the realm of releases forbidden by *Pacific Lumber*."[73]

The Debtor (and Choctaw/CTI) provide only one alleged justification for the third-party releases in this case: that "[t]he releases sought . . . are necessary to implement the Plan and to obtain necessary funding from Holding, Choctaw, or Council Tree."[74] This is, however, the very same justification given by Marathon and Mendocino in *Pacific Lumber*, and the Fifth Circuit explicitly rejected it:

> [Mendocino]/Marathon insist the release clause is part of their bargain because without the clause neither company would have been willing to provide the plan's financing . . . . Instead, the bargain the proponents claim to have purchased is exculpation from any negligence that occurred during the course of bankruptcy . . . . We see little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization.[75]

To conclude, after *Pacific Lumber*, there is a "categorical prohibition"[76] against non-consensual non-debtor releases, discharges, and injunctions -- absent a specific code provision *specifically* allowing for such a release, discharge, or injunction (such as is the case with releases of a creditor committees under § 1103(c) and releases of third-party asbestos claims under § 524(g)). The Plan contains numerous provisions which run afoul of this prohibition, violate § 524(e) of the Code, and, as a result, violate § 1129(a)(1)) of the Code.[77] Accordingly, the Plan should not be confirmed.[78]

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[72] *In re Bigler LP*, 442 B.R. at 534.
[73] *In re Bigler LP*, 442 B.R. at 534.
[74] *See e.g.* Plan, Dkt. #669, at p. 31.
[75] *In re Pac. Lumber*, 584 F.3d at 251-52.
[76] *Id*. at 252 n. 27.
[77] In addition to the above, the Plan and related documents also contain the following provision, which is at least akin to an impermissible third-party release, and is otherwise contrary to the Code, and SkyTel objects to

II. The Plan Should Not be Confirmed to the Extent it Impermissibly Fails to Preserve SkyTel's Claims in and in Connection with the Licenses in both the FCC Proceedings and New Jersey Litigation.

In multiple Orders (in addition to bench opinions and comments from the bench), this Court has clearly stated and recognized that it is not attempting to superimpose its rulings on the FCC; that its rulings are contingent on the FCC's ultimate decision regarding the subject Licenses; that the FCC may ultimately terminate the Debtor's rights in the Licenses; that the parties in this case have not waived or conceded any claims, defenses, or rights they may assert before the FCC or elsewhere; and that SkyTel preserves and maintains its continuing right to assert the claims and positions which are the subject of and/or are related to the FCC Proceedings and New Jersey Litigation (including, among other things, that the Debtor holds no valid interest in the Licenses).[79] This Court has also entered an Order lifting the stay so as to allow the District Court to liquidate SkyTel's claims in the New Jersey Litigation.[80] The Plan and Disclosure Statement, however, are not as clear as the Court's Orders/opinions/comments.

In fact, while certain Plan language appears to acknowledge that the FCC proceedings (including the "multiple proceedings" involving SkyTel) and New Jersey Litigation will be resolved by the FCC and the District Court, and that any Plan confirmation order will be "subject to the proceedings before the FCC" (regarding the Licenses) and subject to the District Court's ruling (regarding liquidation of SkyTel's damages claim),[81] numerous broad-reaching clauses in both the Plan and Disclosure Statement, discussed below, can nevertheless be read as an attempt

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the Plan unless the portion of this provision prohibiting post-confirmation objections to Class 1 through 7 Claims is stricken: "No objections can be filed as to the Class 1 through 8 Claims after Confirmation, except by the Liquidating Agent as to Claims in Class 8." Plan, Dkt. #669, at p. 26; *see also* Disclosure Statement, Dkt. #668, at pp. 41-42, and at Choctaw Proposal (Exhibit C-1), p. 16.

[78] The Plan is also unconfirmable in regards to the subject third-party releases and injunctions because of the Debtor's failure to comply with Fed. Rule Bankr. Pro. 2002(c)(3).

[79] *See e.g.* Dkt. #s 374, 375, 376.

[80] Dkt. #373 (lifting the stay so as to allow the New Jersey Litigation to go forward for all purposes as to the Debtor, through final judgment and all appeals).

[81] *See e.g.* Plan, Dkt. #669, at p. 29.

to "launder" Skytel's claims and foreclose SkyTel from continuing to assert those claims before the FCC and District Court. To that extent, the Plan is unconfirmable as contrary to this Court's rulings and orders (and thus the law of the case), contrary to the Code, indicative of lack of good faith, and because, as discussed below, this Court lacks the authority to enter an Order extinguishing claims regarding FCC spectrum licensing.[82]

Therefore, this Court should either deny confirmation, strike the offending provisions, or include express language in any confirmation Order which clarifies: (a) that the Court is not attempting to superimpose its rulings on the FCC; (b) that the Court's rulings and Orders are contingent on the FCC's ultimate decision regarding the subject Licenses; (c) that nothing contained in the Disclosure Statement, in the Plan, in the confirmation Order, or otherwise shall foreclose SkyTel from continuing to assert its claims in and in connection with the Licenses before both the FCC and District Court; and (d) that SkyTel preserves and maintains its continuing right to assert the claims and positions which are the subject of and/or are related to the FCC Proceedings and New Jersey Litigation (including, among other things, that the Debtor holds no valid interest in the Licenses).

A. The FCC's Sole, Exclusive Authority

Numerous courts have held that the FCC has exclusive jurisdiction over spectrum licensing.[83] Also, as noted by the Second Circuit, in *In re NextWave Personal Communications*

[82] *In re FCC*, 217 F.3d 125 (2nd Cir. 2000); *FCC v. NextWave Personal Comms., Inc. (In re Next Wave Personal Comms., Inc.)*, 200 F.3d 43 (2nd Cir. 1999) ("[I]t is beyond the jurisdictional authority of bankruptcy courts to alter or modify regulatory obligations."); *See U.S. ex rel. FCC v. GWI PCS 1, Inc. (In re GWI PCS 1, Inc.)*, 230 F.3d 788 (5th Cir. 2000); *In re Personal Comm. Network, Inc.*, 249 B.R. 233 (Bankr. E.D.N.Y. 2000).

[83] *In re NextWave Pers. Comm.*, 200 F.3d at 54; *In re FCC*, 217 F.3d 125 (2nd Cir. 2000). The Fifth Circuit has yet to address the issue, but it has noted that it "might agree with the Second Circuit" if the issue came before the court. *U.S. ex rel. FCC v. GWI PCS 1, Inc. (In re GWI PCS 1, Inc.)*, 230 F.3d 788, 805 n. 31 (5th Cir. 2000).

("*NextWave I*")[84] and *In re FCC* ("*NextWave II*"),[85] "FCC licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals and outside the limited jurisdiction of the bankruptcy court."[86] In those cases a debtor had successfully bid on certain FCC spectrum licenses for $4.74 billion.[87] In accordance with FCC regulations, the debtor paid 10% of the bid up front, and the FCC conditionally approved the transfer upon the debtor issuing promissory notes for the remaining balance.[88] But after the debtor executed the notes, the market value of the licenses plummeted.[89]

As a result, the debtor filed a Chapter 11 petition and brought an adversary proceeding against the FCC, claiming that the bids were constructive, fraudulent conveyances.[90] The bankruptcy court agreed, and entered an order avoiding $3.7 billion of the debtor's $4.74 billion obligation.[91] Despite the FCC's claim that the licenses had been revoked, the court's order allowed the debtor to keep the licenses while the debtor reorganized.[92] On appeal, the Second Circuit reversed.

Citing numerous opinions of the United States Supreme Court, the Second Circuit "emphasized that the Federal Communications Act's (FCA) 'terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system,'"[93] which "expresses a desire on the part of Congress to maintain through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[94] Further, "[i]n order for

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[84] *In re NextWave Pers. Comm.*, 200 F.3d 43 (2nd Cir. 1999).
[85] *In re FCC*, 217 F.3d 125 (2nd Cir. 2000).
[86] *Id*. at 129.
[87] *In re NextWave Pers. Comm.*, 200 F.3d at 46.
[88] *Id*. at 47.
[89] *Id*.
[90] *Id*. at 48.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 53 (citing *U.S. v. Sw Cable Co.*, 392 U.S. 157, 168 (1968)).
[94] *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

Congress's prescribed regulatory system to function properly in a dynamic environment, the FCC's allocative decisions *must not be interfered with by other instrumentalities* of the federal government acting beyond their statutory authority."[95] Under the FCA, Congress has given the FCC "exclusive jurisdiction" over the granting and conditioning of spectrum licensing.[96] Accordingly, the Second Circuit held that the bankruptcy court impermissibly interfered with the FCC's regulatory power, and the bankruptcy court lacked the authority to enter an order avoiding the transfer of the licenses and allowing the debtor to retain them over the FCC's objection.[97]

After *NextWave I*, and despite the Second Circuit's clear mandate, the bankruptcy court purported to enjoin the FCC from re-auctioning the spectrum licenses previously held by the debtor.[98] The issue came before the Second Circuit again in *NextWave II*, wherein the Second Circuit reiterated its previous holding that "FCC[] licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals and outside the limited jurisdiction of the bankruptcy court."[99]

While this Court has clearly, and correctly, stated that it is not attempting to superimpose its judgment on the FCC,[100] and while the Plan itself contains language purporting to preserve the FCC's authority[101] and appearing to acknowledge that the FCC proceedings and New Jersey Litigation will be resolved by the FCC and the District Court, numerous broadly crafted provisions in the Plan can be read to conflict with the foregoing and instead to purport to "launder" SkyTel's claims.

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95 *In re NextWave Pers. Comm.*, 200 F.3d at 55-56 (emphasis added).
96 *Id*. at 54.
97 *Id*.
98 *In re FCC*, 217 F.3d 125, 128 (2d Cir. 2000).
99 *Id*. at 129.
100 *See e.g.* Dkt. #s 374, 375, 376.
101 *See e.g.* Plan, Dkt. #669, at p. 30.

Accordingly, SkyTel objects to these provisions, set forth below, and requests this Court to either deny confirmation, strike the offending provisions, or include in any confirmation Order the express, clarifying language set forth above.

B. The Plan's Impermissible Provisions and Clauses[102]

SkyTel objects to *each and every* Plan provision that purports to operate to, or to have the effect of, "laundering" or otherwise impairing Skytel's claims before the FCC and District Court.

For example, post-confirmation, the Plan proposes that the Debtor and the successful proposed buyer, Choctaw or CTI, will seek *Second Thursday* relief from the FCC.[103] The Plan asserts (incorrectly in SkyTel's view) that, if the FCC grants such relief, the Debtor will then be able to transfer, and will transfer, the Licenses to either Choctaw or CTI.[104] Once transferred, the transferee will market and sell those Licenses in their "sole and absolute discretion . . . ."[105] The transferee will then, per the Plan, distribute "all revenue, products and proceeds of the [Licenses]" to the Debtor's creditors as set forth in the Plan and according to either the Choctaw or CTI Proposal.[106] But despite this duty, the Plan grants Choctaw and CTI the "sole and absolute discretion" to *forgo* seeking FCC approval:

> If Choctaw, Holding or Council Tree determine, in their sole and absolute discretion, that obtaining FCC approval of the transfer of any FCC Spectrum License from Maritime is cost prohibitive, Choctaw, Holding or Council Tree shall so inform the Liquidating Agent and such FCC Spectrum License will remain the property of the Debtor.[107]

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[102] In addition to the specific provisions discussed herein, Skytel also objects to any and all language which may be contained in the Disclosure Statement, Plan, Choctaw Proposal, and/or CTI Proposal that could be construed in a manner which fails to preserve SkyTel's claims in the FCC and District Court post-confirmation.

[103] *See* Plan, Dkt. #669, at p. 17.

[104] *See* Disclosure Statement, at CTI Proposal (Exhibit D), p. 5, and at Choctaw Proposal (Exhibit C-1), pp. 3-4; Plan, Dkt. #669, at pp. 10-11, 18.

[105] *See* Plan, Dkt. #669, at p. 10.

[106] *See* Plan, Dkt. #669 at pp. 10-15; Disclosure Statement, at CTI Proposal (Exhibit D), and at Choctaw Proposal (Exhibit C-1), pp. 3-10.

[107] *See* Plan, Dkt. #669, at p. 25; *see also* Disclosure Statement, at pp. 40-41, and at Choctaw Proposal (Exhibit C-1), p. 16.

The Plan then purports to release Choctaw or CTI of any liability for the failure to obtain FCC approval:

> The party that prevails under the Plan, whether Council Tree or Choctaw, shall not have any liability to the Liquidating Agent, any Creditor, or any other party for the failure of the FCC to approve the transfer of any FCC Spectrum License for any reason, including but not limited to the prevailing party's failure or refusal to request such approval in its sole and absolute discretion.[108]

In addition to this impermissible third-party release (objected to above), the Plan further provides that the Licenses will remain in or revert to the Debtor if the FCC fails to grant *Second Thursday* relief:

> If the FCC does not approve the transfer of any FCC Spectrum License from the Debtor to [Choctaw or CTI] such FCC Spectrum License shall remain the property of the Debtor.
>
> The Debtor has held, and will continue to hold the FCC Spectrum Licenses pending the approval of the Plan, and it will continue to hold the FCC Spectrum Licenses unless and until an assignment of transfer thereof is approved by the FCC . . . .
>
> As previously noted, in the event the FCC Spectrum Licenses become property of the Debtor, it will use every reasonable effort to monetize those assets through sales or other dispositions of them in order to achieve the highest and best prices for the FCC Spectrum Licenses . . . . [109]

The Plan is vague as to how this scenario affects SkyTel's claims before the FCC and in the New Jersey Litigation.

For example, if Choctaw or CTI forgo seeking approval, or if the FCC denies approval and any transfers, the Plan provides that the Licenses remain in or revert to the Debtor *without* expressly reserving SkyTel's claims. Indeed, certain language in the Plan arguably purports to extinguish SkyTel's claims:

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[108] *See* Plan, Dkt. #669, at p. 26; *see also* Disclosure Statement, at pp. 40-41, and at Choctaw Proposal (Exhibit C-1), p. 16.
[109] *See* Plan, Dkt. #669, at p. 25; *see also* Disclosure Statement, at Choctaw Proposal (Exhibit C-1), p. 16.

> Except as otherwise provided herein, all property dealt with by the Plan shall be free and clear of all claims, Liens, and interests of any party as of the Confirmation of the Plan. The Plan will evidence the release of any and all Liens or encumbrances against all property dealt with by the Plan, unless such Lien or encumbrance is specifically retained herein.[110]

And while the Plan arguably purports to extinguish SkyTel's claims if the Licenses remain in or revert to the Debtor based on Choctaw/CTI deciding not to seek or failing to obtain *Second Thursday* relief, the plan expressly *preserves secured creditors'* claims in the Licenses:

> If [CTI or Choctaw] determine . . . that obtaining FCC approval of the transfer of any [License] is cost prohibitive . . . such [License] will remain the property of the Debtor. The Secured Lenders and [DIP Lender] shall retain a security interest in the proceeds of the Spectrum Licenses remaining the property of the Debtor to the extent that such claims have not been paid in full . . . In addition, the Secured Lenders claim that they have liens on the proceeds of the FCC Licenses and all other incidents of ownership not excluded by the applicable law and FCC regulations.[111]

Other releases,[112] exculpatory clauses,[113] injunctions,[114] and similar provisions[115] are also extremely broad and purport or arguably purport to foreclose some or all of SkyTel's claims to

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[110] *See* Plan, Dkt. #669, at p. 28. The Plan further provides, and SkyTel objects to, the following similar language: "Except as otherwise provided herein, all property dealt with by the Plan shall be free and clear of all claims, Liens, and interests of any party as of the Confirmation of the Plan. The Plan will evidence the release of any and all Liens or encumbrances against all property dealt with by the Plan, unless such Lien or encumbrance is specifically retained herein." *See* Plan, Dkt. # 669, at p. 32. And also: "From and after the Effective Date, all property of the Estate shall be free and clear of all liens, claims and interest [sic] of Holders of Claims and Interests, except as otherwise provided in this Plan." *See* Plan, Dkt. #669, at p. 22.

[111] *See* Plan, Dkt. #669, at p. 25.

[112] *See e.g.* Plan, Dkt. #669, at p. 31 ("Various releases are called for within the Choctaw offer (Exhibit "C" to the Disclosure Statement, which is incorporated herein by reference) and the Council Tree offer (Exhibit "D" to the Disclosure Statement, which is incorporated herein by reference). Those releases are incorporated by reference in this section of the Plan.); *See* Disclosure Statement, at p. 47, at Choctaw Proposal (Exhibit C-1), p. 21, and at CTI Proposal (Exhibit D), p. 11.

[113] *See e.g.* Plan, Dkt. #669, at pp. 31-32; *see* Disclosure Statement, Dkt. #668 at p. 47, and at Choctaw Proposal (Exhibit C-1), pp 21-22.

[114] *See e.g.* Plan, Dkt. #669, at p. 28 ("[T]he Plan shall . . . discharge claims . . . that arose before the Petition Date," and "[D]istributions provided for under the Plan shall be in exchange for . . . release of all Claims against the Debtor *or any of its assets* . . . .") (emphasis added), p. 30 ("Except as otherwise provided by the Plan, the consideration distributed under the Plan shall . . . release and discharge the Debtor *and its assets* from all Claims of any Creditor . . . .") (emphasis added), p. 32 (purporting to enjoin actions and proceedings against any of the Debtor's property), and p. 33; *see* Disclosure Statement, Dkt. #668 at pp. 46, 48, and at Choctaw Proposal (Exhibit C-1), pp. 22.

and in connection with the Licenses and at the FCC and District Court. By way of example only, the Debtor asserts in the Plan that:

> In the event the Court approves the Plan, then, subject to proceedings before the FCC, and in the event the FCC grants and approves application of the *Second Thursday* doctrine to the Debtor/[Choctaw]/[CTI] or any other corporate entity, the Debtor is of the view that claims pending in the FCC asserted by the Havens Entities ***will be consumed in that litigation***, when combined with approval of the Plan in this Court. Further, while the district court litigation in New Jersey will proceed to establish the amount, if any, of the Havens Entities' monetary claims, those monetary awards, if any, will simply be included in the class of unsecured creditors and paid according to the priority established in the proposed Plan . . .[116]

Not only does that provision purport to launder all of SkyTel's claims before the FCC, including SkyTel's claims on which *Second Thursday* relief would have no effect and which are outside of the Show Cause Hearing,[117] but it also proposes to limit the remedies available in the New Jersey Litigation to monetary damages, where revocation of all the Licenses by the District Court is potentially available under 47 U.S.C. § 313, with no FCC action or consent required.

The Plan also contains a "Permanent Injunction" clause, that can arguably be read to enjoin SkyTel -- and perhaps the FCC Enforcement Bureau -- from asserting its rights and claims related to the Licenses:

> [A]ll Creditors and persons who have held, hold, or may hold Claims or Interests that existed prior to the effective Date, are permanently enjoined on and after the Effective Date against the: (i) commencement or ***continuation of any judicial administrative***, ***or other action or proceeding*** against the [sic] on the account of Claims against or Interests in the Debtor, *or* ***on account of claims released***

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[115] *See e.g.* Plan, Dkt. #669, at p. 19 ("6. Cancellation of Notes, Instruments, Debentures, and Membership Interests. As of the Effective Date, except as otherwise provided herein, (a) all . . . documents evidencing or creating any . . . interests in the Debtor or its assets . . . shall be cancelled, and (b) the obligations of the Debtor under any . . . documents evidencing or creating any Interest in or Claim[] against the Debtor . . . shall be discharged.").

[116] *See* Plan, Dkt. #669, at p. 29; *See* Disclosure Statement, Dkt. #668, at p. 45, and at Choctaw Proposal (Exhibit C-1), p. 19.

[117] For example, the claims regarding the site-based Licenses and termination/cancellation thereof, which cannot be cleared by application of Second Thursday, and SkyTel's Application for Review pending before the FCC (at the full Commission level, with associated petitions based on new facts at the Wireless Bureau level), which claims the rights to all of the Debtor's geographic licenses and is based, to commence with, on the Licenses issued to the Debtor being void *ab initio*.

> ***pursuant to the Plan***; (ii) enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the Debtor, or any assets or property of same; or (iii) creation, perfection or ***enforcement of any encumbrance of any kind against the Debtor*** arising from a Claim.[118]

While the Plan qualifies this proposed injunction by stating that it "will in no way impair the FCC's regulatory authority or any administrative proceedings in exercise of that authority," the Plan makes no reference to not impairing SkyTel's claims, and goes on to state that the Debtor only "*[g]enerally . . . agrees* with the noted language in this paragraph, inserted at the request of the FCC" (whatever that means). Further, the "Debtor asserts that it is also entitled to injunctive relief, ***as to all creditors***, to allow it to enforce the provisions of a plan that may be confirmed by the Court, ***whether or not a discharge is granted*** . . . ."[119] Thus, on one hand, language in the Plan attempts to preserve the FCC claims (but not SkyTel claims), while on the other, it purports to extinguish even FCC claims.

Skytel objects to any and all language, including that set forth and discussed above, which may be contained in the Plan, Disclosure Statement, Choctaw Proposal, and/or CTI Proposal that could be construed in a manner which fails to preserve SkyTel's claims in the FCC and District Court post-confirmation, or otherwise attempts to "launder" and extinguish SkyTel's claims. SkyTel further objects to any and all provisions that purport to usurp the FCC's authority over the FCC licenses. Indeed, this Court lacks the authority to confirm any plan that forecloses the FCC's regulatory authority over spectrum licensing.[120]

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[118] *See* Plan, Dkt. #669, at p. 30 (emphasis added). This same injunction can be found on p. 33 in the proposed Plan, and SkyTel accordingly objects to that injunction as well. *See* Plan, Dkt. #669, at p. 33; *see also* Plan, Dkt. #669, at pp. 28-29, 32-33 ("Legal Binding Effect: Discharge of Claims and Interests."); *see also* Disclosure Statement, at Choctaw Proposal (Exhibit C-1), pp. 20, 22.

[119] *See* Plan, Dkt. #669, at p. 30 (emphasis added).

[120] *In re NextWave Pers. Comm.*, 200 F.3d at 54 ("[b]ecause jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, the [bankruptcy court] lack[s] jurisdiction to decide the question of whether [the debtor] had satisfied the regulatory conditions placed by the FCC upon its retention of the [l]icenses.").

III. The Plan Should Not be Confirmed Because it Improperly Purports to Discharge the Debtor Under § 1141(d)(3), and is Therefore Contrary to § 1129(a)(1) of the Code.

The Plan contains various provisions purporting to discharge the Debtor.[121] Under § 1141(d)(3), a Chapter 11 debtor is not entitled to a discharge if each of the following criteria is met:

> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
> (B) the debtor does not engage in business after consummation of the plan; and
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.[122]

As established below, each of these requirements is met in this case. Accordingly, the Debtor is not entitled to a discharge, the Plan provisions to the contrary violate § 1129(a)(1), and the Plan is therefore unconfirmable.

A. The Debtor Would be Denied a Discharge under § 727(a).

The Debtor is a corporate debtor. Corporate debtors would be denied a discharge under § 727(A) if this case was proceeding under chapter 7 of the Code. Accordingly, the third requirement of § 1141(d)(3) is satisfied.

B. The Plan Provides for the Liquidation of Substantially All of the Property of the Estate.

The Plan provides for the liquidation of substantially all of the property of the estate, or the Debtor's assets. According to the Debtor's Amended Summary of Schedules (the "Amended Schedules"), a copy of which is attached to the Disclosure Statement, the total value of the Debtor's assets is \$46,542,751.63.[123] Also according to the Amended Schedules,

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[121] *See e.g.* Plan, Dkt. #669, at pp. 28, 30-33.
[122] 11 U.S.C. § 1141(d)(3)(A)-(C).
[123] *See* Disclosure Statement, Dkt. #668, at Exhibit A. The Disclosure Statement states on p. 13 that the values listed for the Debtor's assets "reflect what purports to be Debtor's management's estimation of the value of the assets."

$45,200,000.00, or 97.1%, of that total value is attributable to the subject FCC Spectrum Licenses.[124] Under the Debtor's Plan, and subject to FCC approval, the Debtor proposes to "transfer, assign, and sell to [Choctaw or CTI] ***all*** of the Debtor's right, title, and interest in the FCC Spectrum Licenses."[125]

Even if the FCC does not ultimately approve such a transfer, and the Licenses remain with the Debtor (at least for a time), the Plan still proposes (however vague the details may be) the liquidation of the Licenses, with the Debtor to "use every reasonable effort to monetize those assets through sales or other dispositions . . . ."[126] The Plan even provides for the appointment of a "*Liquidating* Agent" to "facilitate a smooth transition of the responsibility of the *wind down* of the Estate . . . ." commencing on confirmation.[127] While the Debtor titled its Plan a "Plan of Reorganization", the Debtor intends to transfer 97.1% (according to the Amended Schedules) of its assets and "will wind down its business upon confirmation . . . ."[128] Thus, clearly, the Plan provides for the liquidation of "substantially all of the property of the estate," and the first requirement of § 1141(d)(3) is satisfied.

C. The Debtor Will Not Engage in Business After Consummation of the Plan.

As noted above, the Plan proposes to liquidate 97.1% (according to the Amended Schedules) of the Debtor's assets by transferring its FCC Spectrum Licenses to either Choctaw of CTI (assuming FCC approval is obtained).[129] According to the Disclosure Statement, the operation of these Licenses is the Debtor's primary business.[130] So, after liquidating these

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[124] *See* Disclosure Statement, Dkt. #668, at Exhibit A.
[125] *See* Plan, Dkt. #669, at p. 10 (emphasis added).
[126] *See* Plan, Dkt. #669, at p. 25.
[127] *See* Plan, Dkt. #669, at pp. 19-20 (emphasis added).
[128] *See* Disclosure Statement, Dkt. # 668, at p. 19.
[129] *See* Plan, Dkt. #669, at p. 10.
[130] *See* Disclosure Statement, Dkt. #668, at p. 13 ("The Debtor owns and operates numerous licenses for wireless and cellular services. The Debtor's assets primarily include Federal Communications Commission . . . licenses . . . and leased transmission tower space.").

principal assets and "wind[ing] down its business upon confirmation,"[131] the Debtor's business activities will effectively cease.

That said, the Plan asserts, and Debtor's counsel has represented, that the Debtor will nevertheless engage in certain business *after confirmation*. Specifically: (1) the Debtor will retain its 95% ownership interest in its subsidiary Critical RF, Inc. ("CRF"), a radio hardware and software company, which will not be purchased by Choctaw or CTI;[132] (2) the Debtor will monitor and assist in seeking any needed FCC approvals and/or relief under *Second Thursday*;[133] (3) the Debtor will "continue to prosecute objections to claims" and, with the Liquidating Agent, "pursue litigation . . ." such as avoidance actions;[134] and (4) the Debtor will market and attempt to sell the Licenses in the event Choctaw/CTI cannot obtain FCC approval or abandon the pursuit thereof.[135] However, as established below, none of these activities constitutes "engag[ing] in business after *consummation* of the Plan."[136] Therefore, the final requirement of § 1141(d)(3) is satisfied, the Debtor is not entitled to a discharge, and the Plan is unconfirmable.

1. Retaining ownership interest in Critical RF, Inc. does not constitute engaging in business after consummation of Plan.

The Debtor's proposal to retain its ownership interest in CRF does not constitute engaging in business after consummation of the Plan. According to the Debtor's Disclosure Statement, CRF has a "nominal" value of $50,000 -- which amounts to 0.10% of the Debtor's pre-petition assets according to the Debtor's values.[137] And even this valuation appears overly optimistic. Indeed, according to the Debtor itself, CRF "has a negative net worth and a history of

[131] *See* Disclosure Statement, Dkt. #668, at p. 19.
[132] *See* Disclosure Statement, Dkt. #668, at p. 14-15; *see also* Plan, Dkt. #669, at p. 29.
[133] *See* Plan, Dkt. #669, at p. 29.
[134] *See* Plan, Dkt. #669, at p. 29.
[135] *See* Plan, Dkt. #669, at p. 29.
[136] 11 U.S.C. § 1141(d)(3)(B).
[137] *See* Disclosure Statement, Dkt. #668, at p. 15.

losses . . . ."[138] Also according to the Debtor, over the year ending May 31, 2012, CRF's "[o]perations resulted in a loss of $40,060.62."[139] Further, "[t]he FCC has recently allocated the 700 MHz D block of frequencies [that CRF operates on] to build a common frequency band of public safety radios,"[140] which, according to the Debtor, "could be a negative for CRF."[141]

Moreover, and perhaps more importantly, the Debtor itself is not "engag[ing] in business" by holding or retaining its majority (or even a full) stock ownership interest in CRF. Instead, the Debtor is merely holding onto an asset. The Debtor asserts, however, that it will "operate [CRF] and provide the resources (***non-monetary*** and ***non-cash***) necessary to grow the business to profitability."[142] But it is a fundamental principal of corporate law that a subsidiary is a separate, legal entity from its stockholder(s).[143] Thus, absent veil piercing, CRF's business activities are its own -- *not* the Debtor's.[144]

Accordingly, the Debtor's proposal to retain its ownership interest in CRF does not constitute engaging in business after consummation of the Plan.[145]

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[138] *See* Disclosure Statement, Dkt. #668, at p. 15.
[139] *See* Disclosure Statement, Dkt. #668, at p. 15.
[140] *See* Disclosure Statement, Dkt. #668, at p. 15.
[141] *See* Disclosure Statement, Dkt. #668, at p. 15.
[142] *See* Disclosure Statement, Dkt. #668, at p. 15 (emphasis added).
[143] *See In re Jones*, 107 B.R. 888, 897 (Bankr. N.D. Miss.) (Houston, J.) ("There are numerous cases which recognize that a corporation and its principal stockholder are not mutual entities to which setoff can apply) (citing *In re Plymouth Plaza Office Bldg. Assocs.*, 16 B.R. 113 (Bankr. E.D. Penn. 1981) (The court held where the lessee owed rent to the debtor who, in turn owed the president of the lessee on a promissory note, there was no mutuality.); *In re Condor Diamond Corp*., 76 B.R. 342 (Bankr. S.D.N.Y. 1987) (The court held that the required mutuality was lacking because the corporate principal was a distinct and separate person from the debtor corporation.); *In re Ingersoll*, 90 B.R. 168 (Bankr. W.D.N.C. 1987) (The fact that a corporation's principal was the guarantor of the corporation's debt to debtors did not satisfy the mutuality requirement for setoff of the corporation's debt owed to the debtors against the debtors' debt owed to the principal.); *In re Eighteenth Avenue Dev. Corp.*, 12 B.R. 10 (Bankr. S.D. Fla. 1981)).
[144] *See In re Owens Corning*, 419 F.3d 195, 211 (3rd Cir. 2005) ("[T]he general expectation of state law and of the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness absent compelling circumstances calling equity . . . into play").
[145] SkyTel would also note that the Debtors' decision to retain its ownership interest in an obviously failing enterprise, and to highlight that to the extent it does in the Disclosure Statement and Plan, is nothing more than a loosely veiled attempt to obtain a discharge to which it is not entitled.

2. Monitoring and assisting in seeking FCC Approvals and/or *Second Thursday* relief does not constitute engaging in business after consummation of Plan.

The Plan provides that, after confirmation, "Maritime and the proposed buyers (Choctaw or [CTI]) will seek *Second Thursday* relief from the FCC."[146] This activity, according to the Plan, constitutes "engaging in business post-*confirmation*."[147] According to the Debtor, a discharge is therefore appropriate. But under § 11141(d)(3)(B), a discharge is only appropriate where the debtor engages in business post-"*consummation*." And, as discussed below, even assuming it is confirmed (which it should not be), this Plan will not be consummated (if ever) until sometime *after* the FCC grants *Second Thursday* relief and whatever other approvals may be required for a transfer of the Licenses to occur. Thus, the Debtor is not, by monitoring and assisting in seeking such seeking such relief/approvals, engaging in post-consummation business, and is not entitled to a discharge.

While the Code does not define "consummation,"[148] it does define "*substantial* consummation."[149] Under § 1101(2), "*substantial* consummation" occurs only after the:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;

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[146] *See* Plan, Dkt. #669, at p. 17.
[147] *See* Plan, Dkt. #669, at p. 29. (emphasis added).
[148] The Plan does define "consummation," though it appears to really be a purported definition of "substantial consummation." *See* Plan, Dkt. #669, at p. 4. Under that definition, the Plan is consummated when "substantially all payments required to be made under th[e] Plan on the Effective Date have been made . . . ." Under the CTI Proposal, the "Effective Date" is "defined to include all FCC approvals, close of pending license sales and other necessary approvals." *See* Disclosure Statement, Dkt. #669, at Exhibit D (CTI Proposal), p. 10. Therefore, under the CTI Proposal, "consummation" does not occur until after the FCC grants *Second Thursday* relief and any other approvals needed to allow the proposal to proceed. Under the Choctaw Proposal, the "Effective Date" is either "the date an order confirming [the] Plan becomes final and non-appealable or when the Plan is substantially consummated, which ever shall occur first." *See* Plan, Dkt. #669, at p. 5. The Choctaw Proposal's definition of "Effective Date" is ambiguous and contravenes the meaning of "substantial consummation" in the Code. Therefore, "the Bankruptcy Code is the proper source to clarify the aforementioned dispute with respect to the definition of 'consummation.'" *Elixer Indus. v. City Bank & Trust Co.*, 2006 U.S. Dist. LEXIS 63439, at *11 (Bankr. W.D. La. 2006) (citing *U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 307 (5th Cir. 2002)).
[149] 11 U.S.C. § 1101(2).

> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; **<u>and</u>**
> (C) commencement of distribution under the plan.[150]

"*Substantial* consummation" is a lesser form of "consummation."[151] While "*substantial* consummation" requires meeting *every* element in § 1101(2),[152] plan consummation "involves many different acts, [only] one of which is '*substantial* consummation.'"[153] Therefore, under § 1141(d)(3)(B), to "engage in business after consummation of the plan,"[154] a debtor must -- at a *bare minimum* -- be engaging in business after each of § 1101(2)'s elements are met. And under the Plan here, the FCC must grant *Second Thursday* relief, and any other required approvals, as a condition precedent to meeting the elements of § 1101(2)(A) and (B).

Specifically, under § 1101(2)(A), the Debtor cannot transfer the FCC Licenses, which constitute "all or substantially all of the property . . . to be transferred," until sometime *after* the FCC grants *Second Thursday* relief and any other required approvals. Further, under § 1101(2)(B), the Debtor cannot transfer the Licenses to Choctaw or CTI, "the successor[s] to the debtor," until *after* FCC approval. [155] Therefore, the Plan cannot be substantially consummated, let alone consummated, until sometime after the FCC grants Second Thursday and all needed approvals (if that ever occurs). And the Debtor is not, by monitoring and assisting in seeking such seeking such relief/approvals, "engag[ing] in business *after* <u>consummation</u> of the plan."[156] The Debtor is thus not entitled to a discharge.

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[150] 11 U.S.C. § 1101(2)(A)-(C) (emphasis added).
[151] *See In re Terracor*, 86 B.R. 671, 675 n. 12 (Bankr. D. Utah 1988); *see also U.S. ex. Rel. FCC v. GWI PCS 1, Inc. (IN re GWI PCS 1, Inc.)*, 230 F.3d 788, 802 (5th Cir. 2000) (Noting that "substantial consummation" is different from "absolute or complete consummation.").
[152] 11 U.S.C. § 1101(2); *In re H&L Developers*, 178 B.R. 77, 80 (Bankr. E.D. Pa. 1994) ("All three elements must be present to support a finding of substantial consummation.").
[153] *In re Terracor,* 86 B.R. at 675 n. 12.
[154] 11 U.S.C. § 1141(d)(3)(B).
[155] *See* Plan, Dkt. #669, at p. 10.
[156] 11 U.S.C. § 1141(d)(3)(B) (emphasis added).

3. <u>Prosecuting objections to claims and pursuing litigation post-petition does not constitute engaging in business after consummation of Plan</u>.

The Plan provides that the Debtor will continue to prosecute objections to claims and pursue litigation post-confirmation.[157] But, as noted in *In re Cypresswood Land Partners, I*,[158] a debtor that pursues litigation after liquidating is not "engag[ing] in business after consummation of the plan."[159] Further, pursuing litigation -- including seeking FCC *Second Thursday* relief -- is not "*engag[ing[in business*" as the Code requires: instead, it is "*engaging in litigation*." Under the plain language of the Code, the Debtor's post-confirmation claims objections and/or litigation does not satisfy the requirements of 1141(d)(3)((B), and the Debtor is not entitled it to a discharge.

4. <u>The Debtor marketing and attempting to sell the Licenses in the event Choctaw/CTI cannot obtain the required FCC approvals or abandon that pursuit, does not constitute engaging in business after consummation of the Plan.</u>

The Plan provides that the Debtor will market and attempt to sell the Licenses in the event Choctaw/CTI cannot obtain FCC approval or abandon the pursuit thereof.[160] However, for the same or very similar reasons discussed above in connection with the Debtor's intent, at least initially, to monitor and assist Choctaw/CIT in seeking FCC approvals, these potential activities do not constitute "engag[ing] in business after *consummation* of the Plan." Indeed, even assuming it is confirmed (which it should not be), the Plan will not be consummated (if ever) until sometime after, among other possible things: (a) the FCC grants *Second Thursday* relief

[157] *See* Plan, Dkt. #669, at p. 29.
[158] *In re Cypresswood Land Partners, I*, 409 B.R. 396, 423 (Bankr. S.D. Tex. 2009) (Proposed plan ran "afoul of . . . 11 U.S.C. § 1141(d)(3) [because] the Debtor will not continue its real-estate business post confirmation; the only action that the Debtor will undertake post-confirmation is the prosecution of the [fraudulent transfer and breach of fiduciary duty] Adversary Proceeding.").
[159] 11 U.S.C. § 1141(d)(3)(B).
[160] *See* Plan, Dkt. #669, at p. 29.

and/or whatever approvals may be required for a transfer of the Licenses to occur (whether the transfer is from the Debtor to Choctaw/CTI, or from the Debtor itself to any other party); and (b) the completion of the "transfer of all or substantially all of the property proposed by the plan to be transferred," which, in this case, is all the Debtor's Licenses.

Thus, because the Plan provides for a liquidation of substantially all of the Debtor's assets, the Debtor would be denied a discharge under § 727(a), and the Debtor will effectively cease to engage in business after plan consummation (indeed, it will be "wind[ing] down its business upon confirmation"), the Debtor cannot receive a discharge under § 1141(d)(3). And because the Plan provides for a discharge, thereby violating § 1141(d)(3), the plan is unconfirmable under § 1129(a)(1).

IV. The Plan Should Not be Confirmed Because it is Not Feasible.

Section 1129(a)(11) requires courts to specifically find that a plan is "feasible" -- i.e., that confirmation of the plan is not likely to be followed by liquidation or further reorganization unless such liquidation or reorganization is proposed in the plan.[161] The purpose of this provision of the Code is to "prevent confirmation of visionary schemes which the debtor can possibly attain after confirmation."[162] Although a debtor need not guarantee the success of its plan, it must provide "reasonable assurance" that the plan can be effectuated.[163] Further, in order to meet the feasibility requirement, the debtor must also show concrete evidence of a sufficient cash flow to fund and maintain all operations and obligations under the plan.[164] The inquiry is

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[161] 11 U.S.C. § 1129(a)(11).

[162] *In re Trails End Lodge, Inc.*, 54 B.R. 898, 903-904 (Bankr. D. Vt. 1985); *In re Sea Garden Motel and Apartments*, 195 B.R. 294, 304 (D.N.J. 1996).

[163] *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2nd Cir. 1988); *In re Atrium Hight Point Ltd. Partnership*, 189 B.R. 599, 609 (Bankr. M.D.N.C. 1995); *In re Orlando Investors, L.P.*, 103 B.R. 593, 600 (Bankr. E.D. Pa. 1989); *In re Kemp*, 134 B.R. 413, 416 (Bankr. E.D. Cal. 1991).

[164] *S&P, Inc. v. Pfeifer*, 189 B.R. 173, 178 (N.D. Ind. 1995); *In re Crosscreek Apartments*, 213 B.R. 521, 539 (Bankr. E.D. Tenn. 1997).

whether the plan proponent has sufficiently established its post-confirmation viability, and its ability to meet its future obligations.[165]

As with the other elements of § 1129(a), the Debtor must establish the feasibility of its plan by a preponderance of the evidence.[166] For all the reasons discussed below, among possible others, the Debtor has not met and simply cannot meet its burden of establishing that effectuation of the Plan is "reasonably assured," and that confirmation of the Plan is not likely to be followed by liquidation or further reorganization. Instead, the Plan involves an impermissible "visionary scheme" and nothing more. Accordingly, the Plan is not feasible and should not be confirmed.

In discussing feasibility of its Plan, the Debtor essentially states[167]: (i) that it "believes that the Plan is feasible, although feasibility depends on . . . a successful '*Second Thursday*' approval by the [FCC]" which would [according to the Debtor] allow Choctaw/CTI to obtain the Licenses from the Debtor and move forward with closing the Asset Purchase Agreements already approved by the Court (the "APAs") and attempting to market and sell the Debtor's remaining Licenses which are not subject to such agreements; and (ii) that, in the event the FCC denies *Second Thursday* approval, or Choctaw/CTI in their sole discretion decline to pursue such approval, the Debtor will itself attempt to market and sale the Licenses so that [according to the Debtor] the sale proceeds may be distributed to creditors pursuant to the priorities established in the Plan.

[165] *See In re Smitty Inv. Group, LLC*, 2008 Bankr. LEXIS 1542, at *43-45 (Bankr. D. Idaho May 16, 2008).
[166] *Matter of Briscoe Enter., Ltd., II*, 994 F.2d 1160, 1165 (5th Cir. 1993); *Locke Mill Partners*, 178 B.R. at 700.
[167] *See e.g.* Disclosure Statement, Dkt. #668, at p. 19; *see also* Plan, Dkt. #669, at pp. 16-19, 28-29, 35.

Regarding statement (i) above, the Debtor's "belief" that the Plan is feasible is completely insufficient to affirmatively establish feasibility.[168] More importantly, however, the fact that this Plan is, according to its express terms, entirely predicated on the Debtor either: (a) obtaining the FCC's approval, through application of the *Second Thursday* doctrine, to transfer the Licenses to Choctaw/CTI for closing the APAs and marketing and selling the remaining Licenses; or (b) in the event *Second Thursday* approval is denied or Choctaw/CTI decline to pursue it, obtaining the FCC's approval to close the APAs and sell the remaining Licenses itself, renders it entirely and incurably unfeasible for several reasons.

First, the Plan is not feasible, and its effectuation is far from reasonably assured, to the extent it may ultimately -- at some undetermined point in the distant future -- rely on the Debtor obtaining the FCC's approval to close the APAs and itself sell the remaining Licenses to fund the Plan, in the absence of *Second Thursday* relief. Indeed, in light of the pending Show Cause Hearing, the serious and numerous allegations which have been directed by the FCC Enforcement Bureau towards the Debtor therein, and the significant and material hurdles the Debtor would very likely face in trying to prevail on the merits at the hearing, such a scenario constitutes a purely, and impermissible, "visionary scheme" which is not feasible.

This is particularly true because, if the Debtor thought it could prevail on the merits at the Show Cause Hearing and thereby obtain the necessary FCC approvals to transfer its Licenses, *it would have already attempted to do that* rather than filing the Bankruptcy Case, *not* because it could not meet the demands of creditors, and *not* because it lacked sufficient net assets or the

[168] *See e.g. In re Bergman*, 585 F.2d 1171, 1179 (2nd Cir. 1978) (Noting that feasibility contemplates "the probability of actual performance of the provisions of the plan. Sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are visionary promises.")

ability to extract income from them,[169] but rather for the primary purpose of attempting to use the *Second Thursday* doctrine to a*ttempt to avoid the defects in the Licenses caused by its principals* (including Sandra DePriest, Donald DePriest, and John Reardon) and the related allegations brought by the FCC Enforcement Bureau.[170]

Second, the Plan is not feasible, and its effectuation is far from reasonably assured, to the extent it relies on obtaining *Second Thursday* relief and further relies on that relief enabling the Debtor to transfer all of its Licenses to Choctaw/CTI so that Choctaw/CTI can close the APAs, market and sell the remaining Licenses, and fund the Plan. Indeed, the Debtor will face significant, material hurdles in attempting to obtain *Second Thursday* relief, and even if *Second Thursday* relief is somehow obtained, there would remain significant and material hurdles to the Debtor transferring the Licenses to Choctaw/CTI to effectuate the remainder of the Plan. Many of the reasons for this are discussed in detail in Exhibit E to the Disclosure Statement ("Exhibit E"), and that exhibit is hereby incorporated herein by reference and will not be repeated in its entirety here. Rather, the major reasons set forth therein will be summarized below.

[169] For example, a large portion of the secured debt (and some of the unsecured debt) is subject to personal guarantees given by Donald DePriest, but the creditors involved have apparently not sought repayment under such guarantees, and DePriest has not performed under the guarantees. Further, but for the FCC Show Cause Order license-revocation Hearing, the Debtor was regularly entering license-sale agreements and leases, generating upfront payments exceeding operating costs, and promising -- upon closing of the sales -- sufficient amounts to service all of the Debtor's debts and for principal repayment.

[170] It cannot be doubted that this was the primary purpose of the bankruptcy filing, in light of both the Plan and the following voicemail Mr. Reardon left for one of the APA counter-parties the day after the petition was filed (the bracketed information was added): "Hey Chris [involved with CoServ, an APA counter-party]. It's John Reardon with MCLM calling. Hey, I actually have some interesting news to share with you. I think it's good news but it doesn't sound like it. We filed chapter 11 yesterday in Northern District of Mississippi in Federal Court. And what that does is it stops the hearing at the FCC from taking place [not true] and allows the bankruptcy judge to essentially tell the FCC to approve the transactions that are pending [not true] and then the money would just go into an escrow account with the bankruptcy court and they would pay out our lenders [not true]. The benefit of that is innocent third parties such as CoServ get their spectrum and are not injured as a result of any wrong doing by our former owner Sandra DePriest and her husband [true regarding the wrongdoing, not true to the extent it implies that Sandra DePriest is no longer involved in the ownership of the Debtor]. She and her husband just basically walked away [not true] and filed chapter 11 yesterday. . . ."

Second Thursday does not and cannot apply under the facts at issue here; as such, the Plan is not feasible to the extent it relies on obtaining *Second Thursday* relief. In fact, *Second Thursday* does not apply to a bankrupt licensee that, as in this case, and as discussed above, entered bankruptcy for the primary purpose of escaping FCC regulations under the guise of the *Second Thursday* doctrine.

Further, in the seminal case involving the *Second Thursday* doctrine[171], the company called Second Thursday, unlike the Debtor here: (i) was insolvent[172], and (ii) had principals deemed wrongdoers who had performed under the terms of their guarantees to creditors. In addition, that case involved "claims held by creditors who [were] wholly unrelated to and unassociated with the [deemed wrongdoer] stockholders."

By contrast, in the instant case, the alleged debt is in large part closely associated with the Debtor's principals, via personal guarantees, association with principals' other businesses (e.g., MariTEL), legal services to defend the principals' management of the Debtor and the licenses, loans to purchase the licenses made at a time when the facts of the alleged wrongdoing by the Debtor's principals was publicly known, and the like.

In addition, the *Second Thursday* opinion noted that "[n]either purchaser is connected with the bankrupt or its stockholders or personally has been associated with the operations of the bankrupt." Given that it is comprised of three of the secured creditors and the president of the Debtor's DIP lender (Southeastern Commercial Finance, a company in which Donald DePriest held a 10% interest at the time the Bankruptcy case was filed), Choctaw is "connected with the bankrupt or its stockholders" and "associated with the operations of the bankrupt."

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[171] *See* 22 F.C.C.2d 515 (1970).

[172] According to the Amended Schedules, this Debtor's assets, on the other hand, exceed its liabilities by over $15,000,000. *See* Disclosure Statement, Dkt. #668, at Exhibit A. The Disclosure Statement states on p. 13 that the values listed for the Debtor's assets "reflect what purports to be Debtor's management's estimation of the value of the assets."

Also, SkyTel is not aware of a single case in which the FCC has applied *Second Thursday* relief to a group of FCC licenses whose value exceeds the value of the FCC determined "innocent" debt. And by any reasonable measure (using the APAs which have been approved in the Bankruptcy Case[173], the SkyTel contracts which the Court has seen, etc), the value of the subject Licenses exceeds *by multiples* all of the Debtor's scheduled debt (not just the "innocent" debt).[174] And both the FCC Administrative Law Judge and the FCC prosecution team's lead attorney, Pamela Kane, have made it clear that, if the value of the subject Licenses exceeds the amount of the FCC-determined innocent debt, then they don't see how *Second Thursday* relief could be obtained.[175]

As stated above, even if *Second Thursday* relief is somehow obtained, the Plan remains unfeasible because there would remain significant and material hurdles to the Debtor transferring the Licenses to Choctaw/CTI to effectuate the remainder of the Plan (by, for example, closing the APAs, marketing and selling the remaining Licenses, and funding the Plan).

Indeed, *Second Thursday* relief does not apply to terminations of the Debtor's site-based Licenses involved in the Show Cause Hearing. Rather, it can only potentially apply to revocations of the Debtor's geographic Licenses involved in the Show Cause Hearing. As such, obtaining *Second Thursday* relief would not enable the Debtor to transfer any site-based Licenses to Choctaw/CTI.

Further, *Second Thursday* relief would have no effect on SkyTel's other legal proceedings which are outside of the Show Cause Hearing -- specifically: (a) SkyTel's

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[173] Those APAs involve a relatively small portion of the Licenses at issue, and reflect depressed values due to the "clouded" state the licenses were in (due to the Show Cause Hearing, etc) when the APAs were negotiated.
[174] *See e.g.* Value Spreadsheet, attached hereto as **Exhibit A**; *see also* Transcript of June 4, 2012 Proceeding Before the FCC, a copy of which is attached hereto as **Exhibit B**, at p. 592 (Debtor's FCC counsel stating "*I'll guarantee you that if there is a Second Thursday grant in this case*, a Second Thursday approval, then yes, then *the licenses are gonig to be worth a heck of a lot more than they are now*.").
[175] *See e.g.* Transcript of June 4, 2012 Proceeding Before the FCC, **Exhibit B** hereto, at pp. 572-598.

Application for Review pending before the FCC (at the full Commission level, with associated petitions based on new facts at the Wireless Bureau level), which claims the rights to all of the Debtor's geographic licenses and is based, to commence with, on the Licenses issued to the Debtor being void *ab initio*; and (b) SkyTel's anti-trust litigation pending before the United States District Court for the District of New Jersey as Civil Action No. 2:11-cv-00993 (the "New Jersey Litigation"), which could result in, among other things, substantial money damages against the Debtor as well as potential revocation of all the Debtor's Licenses by the District Court under 47 U.S.C. § 313, with no FCC action or consent required.

See the Memorandum by Professor James Ming Chen (the "Chen Memo"), attached hereto as **Exhibit F**, which was submitted on behalf of SkyTel entities in the New Jersey Litigation. It sets forth reasons that the plaintiffs, the SkyTel entities, have a sound antitrust claim against the Debtor, and why this claim, if adjudicated against the Debtor, could lead to revocation of all of the Debtor's FCC licenses under 47 U.S.C. §313. This remedy is solely within the jurisdiction of the United States District Courts, as the statute plainly states. This remedy is invoked after said adjudication. That has not yet taken place. This remedy requires no approval or action by the FCC. The District Court has under this statute sole jurisdiction to revoke licenses of a licensee found to have violated federal antitrust law. Thus, any FCC *Second Thursday* relief as to the Debtor's Licenses would have no effect upon this potential license revocation by the US District Court.[176]

Third, the Plan is not feasible, and its effectuation is far from reasonably assured, because it is reliant on the occurrence of far too many contingencies outside the control of the Debtor, and therefore impermissibly speculative and risky. Several of these contingencies are discussed,

[176] The Chen Memo also explains the antitrust savings clause in the Communications Act established by Congress and confirmed by the United States Supreme Court, which further makes clear the sole jurisdiction of the District Courts to adjudicate antitrust law violations by FCC licensees.

or at least alluded to, above -- the Plan's reliance on the FCC granting post-confirmation *Second Thursday* relief (i.e., reliance on the decision of a third party post-confirmation), and whether Choctaw/CTI will be able to market and sell the Licenses not subject to the approved APAs (i.e., reliance on speculative post-confirmation sales).

There are numerous other such contingencies. To name a few -- (a) how long the *Second Thursday* process will or could possibly take; (b) how long it will take Choctaw/CTI to market and sell the non-APA Licenses (assuming they can); (c) how much will operating expenses and administrative expense claims increase during the waiting period; (d) whether Choctaw/CTI will exercise their option, which they may do *at their sole discretion* according to the Plan, to abandon the *Second Thursday* process and/or the marketing and sales efforts and return unsold Licenses to the Debtor; (e) what happens if that happens; (f) whether and when funding for the *Second Thursday* process and/or the marketing and sales efforts, and any other obligations under the Plan, will dry up (given that, under the Plan, *no one is firmly committed or obligated* to continue that funding); (g) what happens if that happens; and (h) whether the APA counter-parties can and will go to closing in the face of SkyTel's other challenges to the Licenses (discussed above) and/or any appeals SkyTel may initiate (of, for example, any *Second Thursday* approval).

Courts have repeatedly denied plan confirmation on feasibility grounds in the face of similar, speculative and risky contingencies, which render plan effectuation far from reasonably assured.[177] As one court sagely stated, when denying confirmation of a speculative plan on feasibility grounds[178]:

[177] *See e.g. Holmes v. United States (In re Holmes)*, 301 B.R. 911, 915 (Bankr. M.D. Ga. 2003) (Court denied plan confirmation on feasibility grounds where the debtor would not be able to perform his obligations under the plan unless the IRS were to agree to accept the debtor's offer to compromise his federal income tax obligations, and where it was uncertain whether the IRS would so agree); *In re Las Vegas Monorail Co*., 462

> The debtor's plan of arrangement is wholly speculative. The debtor can be enthusiastic about tomorrow, today; but that is not sufficient. Ideas are noble, but it is mind boggling to think of the potential hazards that are probable in the future which would prevent the execution of the plan. The seeds in an apple can be counted, but the apples in a seed cannot be counted…The debtor's goals and realities are in conflict.

Fourth, the Plan is not feasible, and its effectuation is far from reasonably assured, because it is impermissibly open-ended and does not impose reasonable time limits. There is no reasonable time limit imposed on obtaining *Second Thursday* relief. There is no reasonable time limit imposed on the closing of the APAs or the marketing and sale of the remaining assets (in the event the FCC approves the Licenses being transferred to Choctaw/CTI).

Perhaps more importantly, in the event Choctaw/CTI unilaterally decide to abandon marketing and selling efforts (which, under the Plan, they have a right to do without penalty), and the unsold Licenses are returned to the Debtor, there is no clear picture of what happens then beyond the Debtor saying it will try to market and sell those Licenses. Does the Plan proceed,

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B.R. 795, 800-801 (Bankr. D. Nev. 2011) (Court denied plan confirmation on feasibility grounds where the plan's success was contingent on an "improbably chain of events" largely outside of the debtor's control); *In re Vanderveer Estates Holding, LLC*, 293 B.R. 560 (Bankr. E.D.N.Y. 2003) (Court denied plan confirmation on feasibility grounds where the plan's success was contingent in part on future sales of property which the debtor could not show were likely to occur); *In re Walker*, 165 B.R. 994, 1005 (E.D. Va. 1994) (same); *In re Hoffman*, 52 B.R. 212, 215 (Bankr. D.N.D. 1985) (same); *In re Christian Faith Assembly*, 402 B.R. 794, 800 (Bankr. N.D. Ohio 2009) (Court denied plan confirmation on feasibility grounds where the debtor proposed to fund its plan through the operation of a child care facility, but the debtor's ability to operate such a facility was contingent on the debtor obtaining, post-confirmation, the necessary licenses and permits from the appropriate regulatory authorities); *In re Yates Dev*., 258 B.R. 36 (Bankr. M.D. Fla. 2000) (Court denied plan confirmation on feasibility grounds where effectuation of the plan relied on post-confirmation sale of property which would not occur unless and until the debtor obtained a favorable ruling from an appellate court in a pending appeal); *In re Southland Invs., Inc*., 2009 Bankr. LEXIS 1889, 11-13 (Bankr. E.D. Tenn. July 2, 2009) (Court denied plan confirmation on feasibility grounds where post-confirmation income and funding sources were not sufficiently definite and thus speculative); *In re Ralph C. Tyler, P.E., P.S., Inc*., 156 B.R. 995, 997 (Bankr. N.D. Ohio 1993) ("The Plan also provides for financing from outside sources. The Plan, however, does not indicate that there is *firm* financing in place and no evidence of any *commitment* to such financing has been provided to the Court. At the point of confirmation, this source of funding must be shown to be *firm* as it goes directly to feasibility. Without evidence of a *firm* commitment of financing, this Plan does not meet the feasibility requirement.") (citations omitted) (emphasis added); *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 489-491 (Bankr. S.D. Ohio 2011) (noting that, at confirmation, the Debtors must show by a preponderance of the evidence that they *can* fund the plan, not that they can obtain an opportunity to do so).

[178] *In Re Macon Uplands Venture*, 5 BCD 885, 890 (Bankr. M.D. Ga. 1979).

completely open-ended, and without clearly defined obligations on the part of the Debtor, for an undetermined period until the end of time? That is how the Plan reads, and that renders the Plan unconfirmable on feasibility grounds for at least two reasons -- (a) it is far too speculative; and (b) the Debtor cannot establish by "concrete evidence" that there will be sufficient cash flow, in the event this scenario occurs, to fund and maintain all operations and obligations under the Plan.[179]

In addition to the foregoing reasons why the Plan is not feasible and confirmation thereof should be denied, the Plan is also not feasible because it fails to specifically and sufficiently account and provide for potential (and in certain cases very likely, and perhaps definite) tax liabilities which may be imposed/assessed post-confirmation in connection with, among other possible things, the various contemplated transfers of the Debtor's Licenses and/or the operations of Choctaw/CTI.

In determining whether a plan is feasible, courts must consider potential liabilities which may be imposed post-confirmation, and must further consider the likelihood that the reorganized debtor will have to satisfy such liabilities. Indeed, the "failure to do so is clearly erroneous and will result in reversal."[180]

A tax assessment by the Internal Revenue Service (the "IRS") is one such liability which must be considered.[181] And where a Chapter 11 plan fails to adequately provide for tax liability,

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[179] *S&P, Inc. v. Pfeifer*, 189 B.R. 173, 178 (N.D. Ind. 1995); *In re Crosscreek Apartments*, 213 B.R. 521 (Bankr. E.D. Tenn. 1997).

[180] Collier on Bankruptcy ¶ 1129.02 [11] n. 189 (16th ed.) (citing *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 517-18 (9th Cir. 2007)).

[181] *See e.g. In re Huddleston*, 1994 Bankr. LEXIS 1961, at *9 (Bankr. W.D. La. 1994) (Plan failed to meet § 1129(a)(11) where potential tax liability jeopardized "the feasibility of funding the Debtor's plan . . . ."); *In re Warren's U-Joint Sales, Inc.*, 1977 U.S. Dist. LEXIS 12902 (S.D. Tex. 1977); *See e.g In re New Mill Meat Service, Inc.*, 15 B.R. 686 (Bankr. W.D. Mo. 1981) (Chapter 11 plan is not entitled to confirmation under 11 USCS § 1129 (a)(11), where plan, amended to include payment of unpaid taxes and interests, is so plainly unfeasible in terms of income and earning power of debtor where evidence does not indicate debtor could pay both taxes and other recurring expenses, or pay monthly payments to mortgage holders.); *In re Preferred Door*

thereby "creating additional uncertainty with respect to [plan] feasibility,"[182] an objection "on the grounds of feasibility . . . must be sustained and the plan denied confirmation . . . ."[183] Indeed, "[t]he feasibility of any proposed plan must depend on what its future tax liability may be."[184]

The case of *In re Mahoney* is both instructive and analogous. In *Mahoney*, an individual Chapter 11 debtor proposed a plan in which he would transfer his "real property, promissory notes, partnership interests and $69,500 in cash, to a new corporation called D.L.M., Inc."[185] Under the plan, the new corporation would develop and sell the Debtor's primary assets, which consisted of real property, and would liquidate or distribute all other assets, over a five-year period for the creditors' benefit.[186] At confirmation, an unsecured creditor objected to plan confirmation arguing, among other things, that "[t]he plan is not feasible as required by § 1129(a)(11) because [the debtor] has failed to properly calculate the tax effect of the proposed operations of [the newly formed successor corporation] and thereby underestimated taxes due from the reorganized debtor."[187] The bankruptcy court agreed.[188]

And not only did the debtor's plan in *Mahoney* fail to properly account for income tax the successor corporation would owe on account of its operations (i.e., the development and sale of the debtor's assets), but the debtor also failed to "calculate[] the income tax effect of *converting*

Co., 990 F.2d 547, 548-49 (10th Cir. 1993) (The Debtor's plan failed to provide for full payment of postpetition taxes, interest, and penalties. Based on realized net income of Debtor, IRS objected to confirmation arguing the Plan was not feasible. At the confirmation hearing, bankruptcy court agreed and converted the case. The Tenth Circuit affirmed.); *In re Smith*, 357 B.R. 60 (Bankr. M.D.N.C. 2006) (Chapter 11 debtors' amended plan did not meet feasibility requirement under 11 USCS § 1129(a)(11) because their plan, which was heavily dependent on success of their business, did not take into account sizable debt for delinquent payroll taxes, and debtors failed to show that business would be able to continue operations and have enough money to pay rent expense and to pay delinquent payroll taxes.).

[182] *In re Fisette*, 459 B.R. 898, 902 (Bankr. D.S.C. 2011).

[183] *In re Mahoney*, 80 B.R. 197 (Bankr. S.D. Cal. 1987).

[184] *In re Warren's U-Joint Sales, Inc.*, 1977 U.S. Dist. LEXIS 12902 (S.D. Tex. 1977).

[185] *In re Mahoney*, 80 B.R. at 198.

[186] *Id*.

[187] *Id*. at 200.

[188] *Id*. at 203.

his non-liquid assets to liquid assets by selling them."[189] Further, the Debtor "submitted no evidence that all transactions by this reorganized debtor will be exempt from taxation so that the failure to include provision for payment of any income taxes is fatal to the validity of the *pro forma's* projections."[190] The bankruptcy court sustained the unsecured creditor's objection "on the grounds of feasibility for failure to properly calculate the effect of income taxes upon the reorganized debtor's operations . . . ."[191]

Similar to the plan in *Mahoney*, the Debtor's Plan here proposes to transfer all of the Debtor's License assets to a newly formed, successor entity (either Choctaw or CTI) for the purpose of that entity liquidating those assets for the benefit of the Debtor's creditors.[192] And just as the debtor in *Mahoney* failed in its plan to account for the potential tax liability of the successor corporation's activities, and for the potential tax liability connected with converting non-liquid assets to liquid assets under its plan, so, too, does the Debtor's Plan here.

By way of example only, the Debtor's Plan fails to even mention, let alone consider and account for: (a) the potential tax liability associated with the post-confirmation activities of Choctaw/CTI; (b) the significant (and seemingly certain to be imposed) capital gains tax liability associated with the transfer of the Debtor's Licenses to Choctaw/CTI; and (c) the potentially significant capital gains tax liability associated with the transfers of the Debtor's Licenses from Choctaw/CTI to any License purchasers, including, at the outset, the counter-parties to the APAs.

Regarding (b), the Debtor obtained the site-based portion of the Licenses from Mobex Network Services, LLC in 2005 for approximately $6,000,000, and obtained the geographic

[189] *Id*. (emphasis added).
[190] *Id*.
[191] *Id*.
[192] *See* Plan, Dkt. #669, at pp. 10, 14.

portion of the Licenses from the FCC in a 2005 auction for $5,865,000.[193] In the Plan, and specifically in connection with the Choctaw Proposal, the Debtor proposes to transfer the Licenses to Choctaw in exchange for and in consideration of full satisfaction of approximately $15,200,000 of scheduled debt.[194] It appears clear that this transfer will result in the imposition/assessment by the IRS of significant capital gains tax liability on the Debtor. The CTI Proposal suffers from similar defects.

Regarding (c), the previously negotiated APAs alone will result in approximately $10,472,000 in net sale proceeds, when and if the deals are closed by Choctaw/CTI.[195] And per the terms of the Plan, the transfer of Licenses from the Debtor to Choctaw/CTI for marketing and sale will only occur, if at all, *after* the Licenses are cleared from the "clouds"[196] and the value of the Licenses go up dramatically as a result.[197] Accordingly, when coupled with the APA proceeds, the proceeds from the sales of Licenses not subject to the APAs[198] could potentially result in the imposition/assessment by the IRS of additional, significant capital gains tax liability on Choctaw/CTI.

Further, even if the transfer of the Licenses to Choctaw/CTI was at the then-current value of the Licenses, prior to clearance of the "clouds" (by FCC action, presumably under the *Second Thursday* doctrine relief described in the Plan), it appears that the transfer could involve far over

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[193] The Debtor initially obtained the geographic Licenses for a bid of $5,083,000 in 2005, which amount was reduced from $7,820,000 by certain bidding credits to which the Debtor falsely claimed to be entitled. However, in 2006, the Debtor later paid an additional $782,000 as a result of a Wireless Telecommunications Board ruling that reduced its bidding credits. *See* Show Cause Order (Redacted), at copy of which is attached hereto as **Exhibit C**, at pp. 5, 7.

[194] *See e.g.* Plan, Dkt. #669, at pp. 9-10; *see also* Claim No. 74-1 (Trammell Proof of Claim).

[195] *See e.g.* Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D), p. 29.

[196] For example, the Show Cause Hearing and SkyTel's other various challenges connection with the Licenses.

[197] No one can reasonably deny this result, including the Debtor. *See e.g.* Transcript of June 4, 2012 Proceeding Before the FCC, **Exhibit B** hereto, at p. 592 (Debtor's FCC counsel stating "I'll guarantee you that if there is a Second Thursday grant in this case . . . the licenses are going to be worth a heck of a lot more than they are now.").

[198] And a substantial amount of the Licenses are in fact not subject to the APAs. *See e.g.* Value Spreadsheet, **Exhibit A** hereto.

$100,000,000 in capital gains, and IRS tax liability to the transferee. However, Choctaw/CTI are not, in the Plan, cash buyers of the licenses. If they do not have cash to buy the licenses, it is not reasonable to assume that they will have cash to pay for the large capital gains that apparently would be imposed, as just indicated. Failure to pay such tax would, or at least clearly could, lead to their failure to be able to perform under the Plan.[199]

As noted by the Fifth Circuit in *IRS v. Taylor*, the IRS need not file a proof of claim in a bankruptcy court to assert tax claims against the debtor or the debtor's successor post-petition.[200] "[T]he IRS has the option to remain outside [a] bankruptcy proceeding and preserve a debt" and is subject to neither the "[g]eneral rule that a confirmed plan [is] res judicata," nor estoppel,[201] for failing to assert the potential tax claim pre-confirmation.[202] It is for this reason, among others, that the failure to properly account for potential tax liability in a reorganization plan renders a plan too uncertain to be feasible: the IRS may, at any time, and without prior warning, assess a considerable tax liability on the debtor or the debtor's successor, thereby compromising the plan's success.

Indeed, even where a feasibility objection is not raised, a plan that fails to provide for the payment of post-confirmation capital gains taxes is still unconfirmable. In *In re Scott Cable Communications, Inc.*,[203] the owner and operator of multiple cable-television systems filed a Chapter 11 petition and sought confirmation of a prepackaged liquidation plan.[204] After the

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[199] CTI/Choctaw may have to reject acceptance of the Licenses, or seek to rescind acceptance and cease performance so as to not incur large, multi-million dollar tax obligations they likely cannot satisfy, and possible ramifications to the officers and principals of CTI/Choctaw. But at minimum, the performance may be materially degraded. These major risks were not disclosed, but render the Plan unfeasible.
[200] *In re Taylor*, 132 F.3d 256, 261-62 (5th Cir. 1998).
[201] Absent, of course, any "affirmative government misconduct in [the] case." *Id*. at 264.
[202] *Id*. at 260, 261, 263-64; *see Hall v. U.S.*, 132 S.Ct. 1882 (2012) (holding that a debtor's post-petition sale for the benefit its creditors is non-dischargeable)
[203] *In re Scott Cable Commc'ns*, 227 B.R. 596 (Bankr. D. Conn. 1998).
[204] *Id*. at 598.

debtor filed its petition, another entity offered to purchase all of the debtor's primary assets.[205] The debtor and the proposed buyer executed an asset purchase agreement, whereby the debtor would sell its interests in all of its assets to the proposed purchaser post-confirmation.[206] Under the plan, however, the Debtor would not pay any federal tax liability on account of the sale: accordingly, the IRS objected to confirmation on the grounds that, among other things, "the [p]lan fail[ed] to provide for the payment of the capital gains tax attributed to the sale as an administrative expense" under 1129(a)(9)(A).[207] The bankruptcy court agreed, and denied confirmation under § 1129(a).[208]

As the Debtor's Plan here is devoid of any sufficiently specific provisions providing for the potential tax liabilities which the IRS may impose/assess post-confirmation in connection with, among other possible things, the various contemplated transfers of the Debtor's Licenses and/or the operations of Choctaw/CTI, the success of the Plan is far too uncertain to meet § 1129(a)(11)'s feasibility standard. If the IRS assess these taxes, the resultant liabilities may very well render the plan unable to be effectuated. Accordingly, the Court should sustain SkyTel's feasibility objection.

Further in this regard, see the spreadsheet, attached as **Exhibit G** hereto, as to the value of the Mobex portion of the Licenses (i.e., the site-based) at the time of their assignment to the Debtor. In this regard:

(1) The FCC did not in the Hearing Designation Order related to the Show Cause Hearing, and did not in the hearing, indicate that the Debtor, itself, had gross revenues of a substantial amount in relation to its acquisition of the Mobex site-based AMTS licenses. That

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[205] *Id*.
[206] *Id*.
[207] *Id*. at 599.
[208] *Id*. at 601.

appears to involve income to Debtor that is the difference between the fair market value of the subject Licenses at the time of assignment of them to Debtor, and the actual amount paid to Mobex by Debtor. This spreadsheets shows the approximate fair market value of those licenses at the time of assignment. As can be seen, the amount is approximately $200 million dollars. However, it is apparent that Debtor paid to Mobex for acquiring the licenses a relatively small sum in cash plus assumption of debt that appears to be well under $10 million. That would appear to result in income to the Debtor at the time of assignment of the licenses close to $200 million. Any such income would have been disclosable to the FCC as gross revenues for purposes of seeking a bidding credit. However, no such Debtor income was reported to the FCC. If the foregoing is correct on a tax basis, and SkyTel has good cause to believe it is, then this would be a very serious misrepresentation to the FCC. Even if the FCC has already in its proof of claim calculated an amount on the basis that Debtor deserved no bidding credit, the foregoing described misrepresentation could result in a large additional sanction fine, that would increase the FCC proof of claim by millions of dollars.

Further, the above financial gain incurred by the Debtor when it obtained the Mobex licenses would appear to result in a large income tax liability to the Debtor from the year of that license acquisition. That would appear to be, based upon the roughly $200 million gain, in the scores of millions of dollars, especially considering penalties and interest that could be as much as the direct tax liability. However, it does not appear that the Debtor could have stated and paid any such tax liability since the record shows that it had very little money after Auction No. 61 after its pay down of some of the Mobex site-lease debt that the Debtor took over with the license purchase. For example, the Debtor has stated on the record before the FCC that it ran out of money to continue to pay the site leases for the licenses purchased from Mobex soon after the purchase when its contract with Central Communications Network failed to result in the expected monthly income. In other words, Debtor did not even have sufficient capital to pay the site leases required to keep the license stations in operation, absent which the licenses would be subject to "automatic termination" under FCC rules. (That is in fact one of the principle subjects of the FCC hearing.) Based on the above, there appears to be a serious or flaw in the Debtor bankruptcy for failure to lawfully state to the IRS the above-described large taxable gain and to pay the tax thereupon, with penalties and interest. That would make the IRS, by far, the largest claim holder in the Debtor.

Finally, SkyTel wishes to note that it has during the course of the Bankruptcy Case provided to the Debtor and creditors herein an outline of a proposal[209] that could, if given serious consideration by and ultimately agreed to by the necessary parties and the FCC, fairly resolve the issues in the Bankruptcy Case (to include payment of the legitimate/innocent creditors and the proper case administration costs), the Show Cause Hearing, the SkyTel Applications for Review, and the New Jersey Litigation, without the need for *Second Thursday* relief.

Importantly, SkyTel's proposal does not suffer from the feasibility defects that are in the Plan, many of which are discussed above. Further, to the extent the Debtor or any other interested parties believe there are problems with SkyTel's proposal from a confirmation standpoint, SkyTel is more than willing to discuss and attempt to reach acceptable resolutions to those. Indeed, SkyTel has been and remains willing to discuss its proposal with any interested parties, despite the fact that the Debtor has indicated that it is unwilling to do so.[210]

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[209] *See* Dkt. # 613-3 (a copy of the outlined proposal in its current form).

[210] *See* Transcript of September 4, 2012 Telephonic Hearing, at p. 42 ("the debtor has no interest in being partners with [SkyTel]"), a copy of which is attached hereto as **Exhibit D**.

V. The Plan Should Not be Confirmed Because it Has Not Been Proposed in Good Faith and Thus Does Not Comply With § 1129(a)(3).

The Plan should not be confirmed because it has not been proposed in good faith and does not comply with § 1129(a)(3). Section 1129(a)(3) requires that a debtor's plan be proposed in good faith and not by any means forbidden by law.[211] A primary purpose of the good faith standard is to "protect[ ] the integrity of the bankruptcy courts and prohibit a debtor's misuse of the process where the overriding motive is to delay creditors without any possible benefit, or to achieve a reprehensible purpose through manipulation of the bankruptcy laws."[212] This is in part because our bankruptcy laws are intended to "limit[] the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'"[213]

As explained by the Fifth Circuit: "Where the plan is proposed with the *legitimate and honest purpose to reorganize* <u>and</u> has a *reasonable hope of success*, the good faith requirement of § 1129(a)(3) is satisfied."[214] Discussing the concept of "good faith" in the context of filing a petition, the Fifth Circuit observed that "good faith implies an honest intent and genuine desire on the part of the petitioner to use the statutory process to effect a plan of reorganization and not merely as a device to serve some sinister or unworthy purpose"[215]

The requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan.[216] Indeed, "the good faith determination depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial

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[211] 11 U.S.C. § 1129(a)(3).
[212] *In re Jasik*, 727 F.2d 1379, 1383 (5th Cir. 1984) (quoting *Public Finance Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir.1983)).
[213] *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).
[214] *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir.1985) (emphasis added).
[215] *In re Metro. Realty Corp.*, 433 F.2d 676, 678 (5th Cir. 1970) (citing *In re S. Land Title Corp.*, 301 F. Supp. 379, 428 (E.D. La. 1968)).
[216] *In re Sun Country Dev.*, 764 at 408 (5th Cir.1985); *In re T-H New Orleans Ltd. Pshp.*, 116 F.3d 790, 802 (5th Cir. 1997).

condition, motives, and the local financial realities[, and a] collation of factors, rather than any single datum, controls resolution of this issue."[217]

While the inquiry turns on the totality of the circumstances, situations in which good faith has been found to be lacking include those involving: (i) use of the bankruptcy system simply to avoid the consequences of prior misconduct; (ii) the filing of a case as to avoid an obligation under circumstances in which the debtor is not in need of reorganization; (iii) the absence of any likelihood of rehabilitation; (iv) use of the bankruptcy process merely to frustrate the rights of creditors (particularly with respect to single asset cases) or to coerce unfair treatment; and (v) the filing of a case as a litigation tactic such as to prevent pre-petition litigation from proceeding.[218]

As with the other requirements of § 1129(a), the Debtor bears the burden of establishing that its Plan was proposed in good faith by a preponderance of the evidence.[219] And without assuming the Debtor's burden on this issue, SkyTel submits that the totality of the circumstances here demonstrate that the Debtor cannot meet its burdent because the Plan has not been proposed in good faith, does not comply with § 1129(a)(3), and should not be confirmed. Those circumstances include, but are not necessarily limited to, the following.

First, the Plan as proposed by the Debtor does not have a reasonable hope of success; indeed, there is a complete absence of any likelihood of rehabilitation in this case for the *numerous* reasons discussed herein as to the Plan's lack of feasibility. And bad faith will be found where the plan is either unrealistic or visionary (i.e. not feasible),[220] as this one is.

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[217] *In re Elmwood Dev. Co.*, 964 F.2d 508, 510 (5th Cir. 1992).
[218] *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986) (discussing lack of good faith as basis for lifting the stay); *see also Furness v. Lilienfield*, 35 B.R. 1006, 1013 (D. Md. 1983) ("The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation.").
[219] *In re Briscoe Enter., Ltd., II*, 994 F.2d 1160, 1165 (5th Cir.1993).
[220] *See In re Immenhausen Corp.*, 172 B.R. 343 (Bankr. M.D. Fla. 1994).

Second, the Plan was not proposed by an "honest but unfortunate debtor" with the legitimate and honest purpose to reorganize. Instead, the case was filed, and the Plan was proposed, in an effort to avoid obligations under circumstances in which the Debtor was not in "genuine financial distress" and was not in real need of reorganization. In fact, as discussed previously, the Debtor appears to have filed the Bankruptcy Case, and proposed its Plan, not because it could not meet the demands of creditors,[221] and not because it lacked sufficient net assets or the ability to extract income from them,[222] but rather for the primary purpose of attempting to use the *Second Thursday* doctrine to attempt to avoid the defects in the Licenses caused by its principals (including Sandra DePriest, Donald DePriest, and John Reardon) and the related allegations brought by the FCC Enforcement Bureau.[223]

Third, the case was filed, and the Plan was proposed, as part of a litigation tactic to attempt to use and manipulate the bankruptcy system and laws to escape the Show Cause Hearing (and thus avoid the consequences of the prior misconduct of the Debtor and its

[221] For example, a large portion of the debt was backed by personal guarantees given by Donald DePriest, but the creditors involved, many of whom have substantial ties to the DePriests (as has been shown in this case), apparently decided not to seek repayment under the guarantees. Similarly, it appears those same creditors were not pressing the Debtor for repayment of the debts.

[222] Indeed, but for Show Cause Order and related license-revocation Hearing, the Debtor was regularly entering license-sale agreements and leases, generating upfront payments exceeding operating costs, and promising -- upon closing of the sales -- sufficient amounts to service all of the Debtor's debts and for principal repayment. Further, the Debtor has been and is able to lease the spectrum despite the clouds on the Licenses.

[223] And this was clearly the primary purpose of the bankruptcy filing. This is evident from, among other things, the terms of the proposed Plan and the Reardon voicemail, referenced above, which he left for one of the APA counter-parties the day after the petition was filed (the bracketed information was added): "Hey Chris [involved with CoServ, an APA counter-party]. It's John Reardon with MCLM calling. Hey, I actually have some interesting news to share with you. I think it's good news but it doesn't sound like it. We filed chapter 11 yesterday in Northern District of Mississippi in Federal Court. And what that does is it stops the hearing at the FCC from taking place [not true] and allows the bankruptcy judge to essentially tell the FCC to approve the transactions that are pending [not true] and then the money would just go into an escrow account with the bankruptcy court and they would pay out our lenders [not true]. The benefit of that is innocent third parties such as CoServ get their spectrum and are not injured as a result of any wrong doing by our former owner Sandra DePriest and her husband [true regarding the wrongdoing, not true to the extent it implies that Sandra DePriest is no longer involved in the ownership of the Debtor]. She and her husband just basically walked away [not true] and filed chapter 11 yesterday. . . ."

principals, who are -- based on the Hearing Designation Order among other things -- anything except "honest but unfortunate") and to attempt to frustrate SkyTel and its License-related challenges pending before the FCC. This is apparent for the same reasons discussed in the immediately preceding paragraph. This is also apparent because, had the Debtor thought it could prevail on the merits at the Show Cause Hearing (and thus avoid the consequences of prior misconduct), it could have proceeded to do so with *much* less effort than it has expended in connection with the filing and prosecution of the Bankruptcy Case. Instead, the Debtor has spent its time focused on subverting the discovery efforts of both the FCC Enforcement Bureau (in the Show Cause Hearing) and SkyTel (in the New Jersey Litigation), hoping to drag things out until it can attempt to obtain relief under Second Thursday, relief to which it is not entitled and which would not fully resolve the problems with the Licenses in any event.

Fourth, as discussed in detail above, the Plan, as proposed, contains broad and sweeping language which can be read as an attempt to "launder" Skytel's claims and foreclose SkyTel from continuing to assert those claims before the FCC and District Court. This Plan is, in this regard, completely contrary to numerous Court Orders, bench opinions, and the like. The fact that the Plan contains this language, in many places peppered throughout the fine print, is indicative of *bad* faith (not just lack of good faith), and further indicative of a Plan whose object is to manipulate the system to escape the consequences of prior Debtor misconduct rather than to effectuate a proper reorganization.

Fifth, as discussed in detail above, the Plan, as proposed, contains a number of third-party releases and other clauses that purport to release, exculpate, and/or discharge various non-Debtor parties, and/or to enjoin third-parties from bringing claims against those non-Debtor parties, all in clear violation of § 524(e) and in a manner forbidden by Fifth Circuit law. This, especially when considered along with the other circumstances discussed herein, is indicative of a lack of good faith on the part of the Debtor in proposing this Plan.

Sixth, the Plan, as proposed, arbitrarily prohibits post-confirmation objections to secured claims in Classes 1 through 7.[224] Classes 1 through 3 consist of claims held by parties (Collateral Plus, Hollis, and Watson & Downs, LLC) who have joined together with Trammell to form Choctaw. Classes 4 through 7 include the secured claims of DuPree, NRTC, the priority tax claims, and the DIP Lender. Several of these parties have close ties to the Debtor and its principals (including Donald DePriest) who are the subject of or are closely involved with the Show Cause Hearing.[225] In SkyTel's view, it is indicative of bad faith for the Plan to shield these creditors' claims from claims objections upon confirmation when, in the event there are problems with some of these claims that might come out after the committee and others have had a more adequate opportunity to review them, that could substantially benefit creditors (to include SkyTel).

Seventh, the Plan describes a scenario where, in the event the Licenses are ultimately transferred to Choctaw or CTI and sold for a windfall profit above and beyond the amount of the total debt (which is not unlikely to happen were this scenario to play out, given how valuable the Licenses are and especially will be if and when they are cleared of the "clouds" currently upon them), that profit goes to Choctaw/CTI. Or, once enough Licenses are sold to pay off the debt, the remaining Licenses remain with Choctaw/CTI. That in and of itself makes this Plan lacking in good faith, especially considering the close ties between Choctaw and the Debtor/its principals.

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[224] Plan, Dkt. #669, at p. 26; *see also* Disclosure Statement, Dkt. #668, at pp. 41-42, and at Choctaw Proposal (Exhibit C-1), p. 16.

[225] *See e.g.* Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D), pp. 23-25, 36-38.

Eighth, as discussed in detail above, the Plan, as proposed, seeks to disallow SkyTel's potential statutory treble damages award in the New Jersey Litigation, contrary to law and this Court's Order Lifting the Stay. This part of the Plan appears to be designed to impact SkyTel and SkyTel alone, and that is indicative of bad faith.

Ninth, as discussed above, SkyTel previously provided to the Debtor and creditors herein an outline of a proposal[226] that could, if given serious consideration by and ultimately agreed to by the necessary parties and the FCC, fairly resolve the issues in the Bankruptcy Case (to include payment of the legitimate/innocent creditors and the proper case administration costs), the Show Cause Hearing, the SkyTel Applications for Review, and the New Jersey Litigation, without the need for *Second Thursday* relief. SkyTel's proposal does not suffer from the feasibility defects that are in the Plan, many of which are discussed above. SkyTel has been and remains willing to discuss its proposal with any interested parties. The Debtor, however, has indicated that it is unwilling to do so,[227] and that is indicative of a lack of good faith, particularly considering the feasibility defects in the Debtor's Plan.

For all the reasons discussed above, among possible others, SkyTel submits that the totality of the circumstances demonstrate that the Plan has not been proposed in good faith, does not comply with § 1129(a)(3), and should not be confirmed.

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[226] *See* Dkt. # 613-3.

[227] *See* Transcript of September 4, 2012 Telephonic Hearing, **Exhibit D** hereto, at p. 42 ("the debtor has no interest in being partners with [SkyTel]")

VI. The Plan Should Not be Confirmed to the Extent it Purports to Disallow SkyTel's Potential Treble Damages Award in the New Jersey Litigation, in Violation of 11 U.S.C. § 1129(a)(1).

In the New Jersey Litigation pending in the United States District Court for the District of New Jersey, SkyTel has asserted claims against the Debtor under the Sherman Antitrust Act.[228] In that action, SkyTel seeks, among other things, damages under 15 U.S.C. § 15, which provides that any plaintiff injured under the Sherman Act "shall recover threefold the damages by him sustained . . . ."[229] This Court has entered an Order lifting the stay "with respect to the New Jersey [L]itigation,"[230] and, pursuant to that Order, and under the Plan, that litigation is to proceed in order "to establish the amount, if any, of [SkyTel's] monetary claims, [which will] be included in the class of unsecured creditors and paid according to the priority established in the proposed Plan of reorganization."[231] While the Order Lifting the Stay, and the aforementioned Plan language, explicitly preserve SkyTel's Sherman Antitrust claims and the damages related thereto, another clause in the Plan could be read to disallow SkyTel's potential treble damages award.

This clause is found in the Plan's definition of the term "Allowed Claim."[232] The clause provides that "[u]nless otherwise specifically provided in the Plan, an Allowed Claim shall not include any amount for *punitive damages* or *penalties*."[233] To the extent this clause can be read to disallow a portion of SkyTel's potential award -- in violation of this Court's Order Lifting the

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[228] *See* Plan, Dkt. # 669, at p. 29; *See* United States District Court for the District of New Jersey Civil Action No. 2:11-vn-00093-KSH-PS.
[229] 11 U.S.C. § 15.
[230] *See Order Granting Motion for an Order Pursuant to 11 U.S.C. § 362(d) Granting the SkyTel Entities Relief from the Automatic Stay to Pursue Prepetition Litigation* (the "Order Lifting the Stay"), Dkt. #373.
[231] *See* Plan, Dkt. #669, at p. 29; *see* Disclosure Statement, Dkt. #668, at p. 45, and at Choctaw Proposal (Exhibit C-1), p. 19, and at CTI Proposal (Exhibit D), p. 11 n. 1.
[232] *See* Plan, Dkt. #669, at pp. 2-3; Disclosure Statement, Dkt. #668, at p. 5.
[233] *See* Plan, Dkt. #669, at pp. 2-3 (emphasis added); *See* Disclosure Statement, Dkt. #668, at p. 5.

Stay and §§ 502, 510(c), and 524(e) of the Code -- the Court should either strike the clause from the Plan or deny confirmation under § 1129(a)(1).

The Bankruptcy Court for the Southern District of New York addressed a similar situation in *In re American Federation of Television & Radio Artists*.[234] In that case, a jury rendered a verdict against a Chapter 11 debtor for violations of the Sherman Antitrust Act and awarded treble damages in excess of $10 million under 15 U.S.C. § 15.[235] The debtor urged the court to disallow claims for treble damages because, as a court of equity, the bankruptcy court lacked the authority to enforce a penalty.[236] The bankruptcy court disagreed.[237] While noting that treble damages can be considered punitive in nature, the court nevertheless held that "statutory treble damages in a valid judgment are not penalties of a sort that Congress intended the bankruptcy courts not to enforce in a Chapter 11 proceeding."[238]

Further, while some courts do disallow punitive damages, they do so only where the debtor's "punitive damage exposure [is] *staggering*" and "*unpredictable*," such as in toxic tort cases.[239] Further, where there is no sufficient showing that punitive damages will in fact interfere with reorganization, disallowance is improper.[240] Here, even assuming that the potential treble damages are a form of punitive damages, the Debtor has not established a staggering and unpredictable exposure to punitive damages, or that SkyTel's potential treble damages will interfere with reorganization.

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[234] *In re Am. Fed'n of Television & Radio Artists*, 32 B.R. 672, 673 (Bankr. S.D.N.Y. 1983).
[235] *Id*.
[236] *Id*.
[237] *Id*. at 674.
[238] *Id*.
[239] *See e.g. In re A.H. Robins Co., Inc.*, 89 B.R. 555, 558 (E.D. Va. 1988) (emphasis added).
[240] *See In re FF Holdings Corp.*, 1998 U.S. Dist. LEXIS 10741, at *23 (D. Del. 1998).

Based on the foregoing, to the extent the subject clause can be read to disallow a portion of SkyTel's potential award, the Court should either strike the clause or deny confirmation under § 1129(a)(1).

VII. The Plan Should Not be Confirmed Because it Fails to Include a Liquidation Analysis and Does Not Meet the Best Interests of Creditors Test as Required by § 1129(a)(7).

Under § 1129(a)(7), a plan must be in the "Best Interests of the Creditors" to be confirmed. That means that each holder of an impaired claim or interest has either accepted the plan or:

> will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.[241]

This test has been referred to as "one of the cornerstones of chapter 11 practice [and] an individualized guaranty to each creditor or interest holder that it will receive at least as much in a reorganization as it would in a liquidation."[242] Accordingly, "in all but the rarest cases, such an analysis will be part of the disclosure statement distributed to claim and interest holders, and will be required to establish compliance with § 1129(a)(7)." And "[w]ithout a liquidation analysis, <u>the requirement of § 1129(a)(7) cannot be met</u>."[243]

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[241] 11 U.S.C. § 1129(a)(7).

[242] Collier on Bankruptcy ¶ 1129.02 [7] (16th ed.).

[243] *Id*. at ¶ 1129.02 [7], n. 98 (citing *In re Modern Steel Treating Co.*, 130 B.R. 60 (Bankr. N.D. Ill. 1991); *In re MCorp Fin. Inc.*, 137 B.R. 219 (Bankr. S.D. Tex. 1992)) (emphasis added); s*ee also In re Multiut Corp.*, 449 B.R. 323, (Bankr. N.D. Ill. 2011) (Denying confirmation where "[d]ebtor provides very little in the way of a liquidation analysis, relying almost solely on its Schedule B. Other than the conclusory testimony from [the debtors expert] and assertions in the disclosure statement, ***there is no actual evidence or analysis to indicate what creditors would receive in a Chapter 7 versus a Chapter 11 case***."); *In re Valley Park Group, Inc.*, 96 B.R. 16, 23 (Bankr. N.D.N.Y. 1989) (Plan in unconfirmable in "the absence of a liquidation analysis satisfying the 'best-interst-of-creditors test' under Code § 1129(a)(7)); (*In re S.E.T. Income Properties, III*, 83 B.R. 791, 792 (Bankr. N.D. Okla. 1988) ("At a minimum to confirm a plan . . . the disclosure statement must include . . . a liquidation analysis.").

Here, both the Disclosure Statement and the Plan fail to include a liquidation analysis, a burden the Code clearly puts on the Debtor.[244] With regard to this "cornerstone of chapter 11," the Plan here merely states:

> 1. The Plan Meets the "Best Interest of Creditors" Test
>
> The "best interest of creditors" test requires that the Bankruptcy Court find that the plan provides to each non-accepting holder of a Claim treated under the Plan a recovery which has present value at least equal to the present value of the distribution that such person would receive from the Debtor if the Debtor liquidated under Chapter 7 of the Code.[245]

This simple, conclusory statement is wholly inadequate to satisfy § 1129(a)(7). "The best interests valuation is to be based on evidence *not assumptions*,"[246] and the Debtor has failed to meet its burden of putting forth that evidence; indeed, the Debtor has put forth *no* evidence.

The CTI Proposal fails to satisfy § 1129(a)(7) in another way as way.[247] Under that Proposal, CTI has capped the total amount it will distribute to "Unsecured Creditor Claims" at "$8.89 million."[248] This is so regardless of the amount of proceeds CTI actually receives from the sale of Licenses. So, according to the Proposal, CTI will retain any proceeds in excess of $8.89 million after distribution to the unsecured class -- the final class to be paid under the Proposal. While this may be in the best interests of CTI, it is *not* in the best interests of the creditors, and fails to satisfy § 1129(a)(7). This Court should therefore deny confirmation.

VIII. The Plan Should Not be Confirmed Because the Debtor Has Not Complied with the Provisions of Code as Required by § 1129(a)(2).

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[244] *In re MCorp Fin., Inc.*, 137 B.R. 219, 229 (Bankr. S.D. Tex. 1992).
[245] *See* Plan, Dkt. #669, at p. 34-35; *See* Disclosure Statement, Dkt. #668, at pp. 19-20 (Merely stating that "[t]he Debtor believes that the Plan meets the 'best interests' test . . . because members of each Impaired Class will receive at least as much under the Plan as they would in a liquidation in a chapter 7 case and that the Plan satisfies the 'best interests' test. The Plan proposes to pay all allowed claims in full. Because of the highly specialized nature of the [Licenses] it is doubtful that a Chapter 7 trustee would be able to liquidate the [Licenses] in such a manner and at such a price as to pay all allowed claims in full.").
[246] *In re Multi Corp.*, 449 B.R. at 344.
[247] *See* Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D).
[248] *See* Disclosure Statement, Dkt. #668, at CTI Proposal (Exhibit D), p. 11.

The Plan cannot be confirmed where the plan proponent has not complied with all of the applicable provisions of the Code during the pendency of the bankruptcy case.[249] Serious violations of the Code by a plan proponent can and should result in denial of confirmation of a proposed plan.[250]

In the instant case, the Debtor voluntary turned back in a significant and valuable amount of its site-based Licenses, including component station authorizations, to the FCC for permanent cancellation (including by deletion of stations), pursuant to a "Limited Joint Stipulation" entered into with the FCC Enforcement Bureau.[251] These include licenses in a large percentage of major and other important markets in the nation. These site-based licenses constitute a significant part of the Debtor's total licenses, measured on a MHz Pops or MHz square miles basis, and the Debtor has represented all along that all of its Licenses, included these, are both valid and valuable. Essentially, the Debtor apparently entered a binding stipulation with the FCC Enforcement Bureau to abandon these assets unilaterally (with no consideration received in exchange from the FCC), and *without notice to creditors or authorization from this Court*.

[249] *See* 11 U.S.C. § 1129(a)(2).
[250] *See In re Landing Assocs, Ltd.*, 157 B.R. 791, 810 (Bankr. W.D. Tex. 1993); *In re Great Bay Hotel & Casino, Inc.*, 251 B.R. 213 (Bankr. D.N.J. 2000).
[251] A copy of the Limited Joint Stipulation is attached hereto as **Exhibit E**. None of these site-based Licenses have rights that are subsumed in full under the co-channel (same frequency) geographic license for the surrounding area that the Debtor alleges to validly hold. For one thing, the geographic licenses are subject to revocation in the ongoing Show Cause Hearing, as described in the related Hearing Designation Order, for violation of FCC auction and related rules (and for misrepresentation and lack of candor). And these site-based Licenses are also subject in that hearing to "automatic termination" for lack of timely and proper construction and operations. If a geographic license in an area is revoked, the co-channel site-based license may not be adversely affected if it were valid and had been maintained and not cancelled. Indeed, the Debtor previously asserted that before the FCC and in its marketing of the site-based along with the geographic licenses.

The Debtor's abandonment of these assets, without notice or Court approval, is contrary to and a serious violation of the Code (including but not necessarily limited to § 554(a)[252]) and the Plan should therefore not be confirmed.

IX. The Plan Should Not be Confirmed Because its Proposed Treatment of Certain Executory Contracts and Unexpired Leases is Impermissble under § 1129(a)(1).

The Plan should not be confirmed because its proposed treatment of certain executory contracts and unexpired leases does not comply with applicable provisions of the Code and is thus impermissible under § 1129(a)(1). The Plan provides that the Debtor will assume and assign to Choctaw/CTI "[a]ll Executory Contracts, including all current or future contracts to sell FCC Spectrum Licenses, that have not been previously rejected, or are the subject of a pending motion to reject as of the Confirmation Hearing" and that such Executory Contracts will be assumed and assigned "as of the Effective Date pursuant to Bankruptcy Code §§ 365 and 1123."[253]

However, "current or future contracts to sell FCC Spectrum Licenses" should not be subject to assumption/assignment without the Court considering and making a determination at a hearing that each of the elements of § 363 have been complied with and that the proposed assumption/assignment can be approved. Accordingly, the Plan should not be confirmed as proposed.

X. The Plan Should Not be Confirmed Because it Does Not Meet the Requirements for Cramdown Under § 1129(b).

To the extent if any the Debtor is required to attempt to obtain confirmation through cramdown, the Plan should not be confirmed because the Debtor has not demonstrated, and cannot meet its burden of demonstrating, that the Plan does not discriminate unfairly, and is fair

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[252] Section 554(a) governs the circumstances in which a debtor-in-possession may abandon property, which is only allowed <u>after notice and a hearing</u>.
[253] *See* Plan, Dkt. #669, at p. 23; *see* Disclosure Statement, Dkt. #668, at p. 38.

and equitable with respect to each class of creditors that is impaired under the Plan that has not accepted the Plan as is required by § 1129(b).

XI. Alternatively, in the Event the Plan is Confirmed, SkyTel Requests that the Confirmation Order Contain Language Consistent with the Court's Prior Orders.

As discussed above, the Court, in multiple Orders (in addition to bench opinions and comments from the bench), has stated and recognized that it is not attempting to superimpose its rulings on the FCC; that its rulings are contingent on the FCC's ultimate decision regarding the subject Licenses; that the FCC may ultimately terminate the Debtor's rights in the Licenses; that the parties in this case have not waived or conceded any claims, defenses, or rights they may assert before the FCC or elsewhere; and that SkyTel preserves and maintains its continuing right to assert the claims and positions which are the subject of and/or are related to the FCC Proceedings and New Jersey Litigation (including, among other things, that the Debtor holds no valid interest in the Licenses). This Court has also entered an Order lifting the stay so as to allow the District Court to liquidate SkyTel's claims in the New Jersey Litigation.

If the Court chooses to confirm the Plan (which it should not), SkyTel requests that the confirmation Order include express language which clarifies: (a) that the Court is not attempting to superimpose its rulings on the FCC; (b) that the Court's rulings and Orders (including the confirmation Order) are contingent on the FCC's ultimate decision regarding the subject Licenses; (c) that nothing contained in the Disclosure Statement, in the Plan, in the confirmation Order, or otherwise shall foreclose SkyTel from continuing to assert its claims in and in connection with the Licenses before both the FCC and District Court; and (d) that SkyTel preserves and maintains its continuing right to assert the claims and positions which are the subject of and/or are related to the FCC Proceedings and New Jersey Litigation (including, among other things, that the Debtor holds no valid interest in the Licenses).

SkyTel also requests that any confirmation Order include the following language consistent with the Court's *Agreed Order Setting the Amount at Which SkyTel's Claims Should be Temporarily Allowed for Certain Limited Purposes* (Dkt. #685) – "This Order does not have and may not be used for purposes of seeking any preclusive effect (whether under the doctrine of res judicata, collateral estoppel, or otherwise), or any other effect whatsoever, in connection with or on the New Jersey Litigation, any proceeding before the Federal Communications Commission, or any other proceeding."

WHEREFORE, PREMISES CONSIDERED, for the above stated reasons, and for possible other reasons to be stated at the confirmation hearing, SkyTel respectfully requests that this Court enter an Order denying confirmation of the Plan. Alternatively, SkyTel requests that any confirmation order include the language requested above by SkyTel. SkyTel further prays for general relief.

THIS the 1st day of November, 2012.

Respectfully submitted,

WARREN HAVENS, SKYBRIDGE SPECTRUM FOUNDATION, VERDE SYSTEMS LLC, ENVIRONMENTAL LLC, INTELLIGENT TRANSPORTATION & MONITORING LLC, and TELESAURUS HOLDINGS GB LLC

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing to be filed via the Court's Electronic Case Filing System, which caused a copy to be served on all counsel and parties of record who have consented to receive ECF notification, including the following:

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THIS the 1st day of November, 2012.

/s/ William H. Leech
Of Counsel